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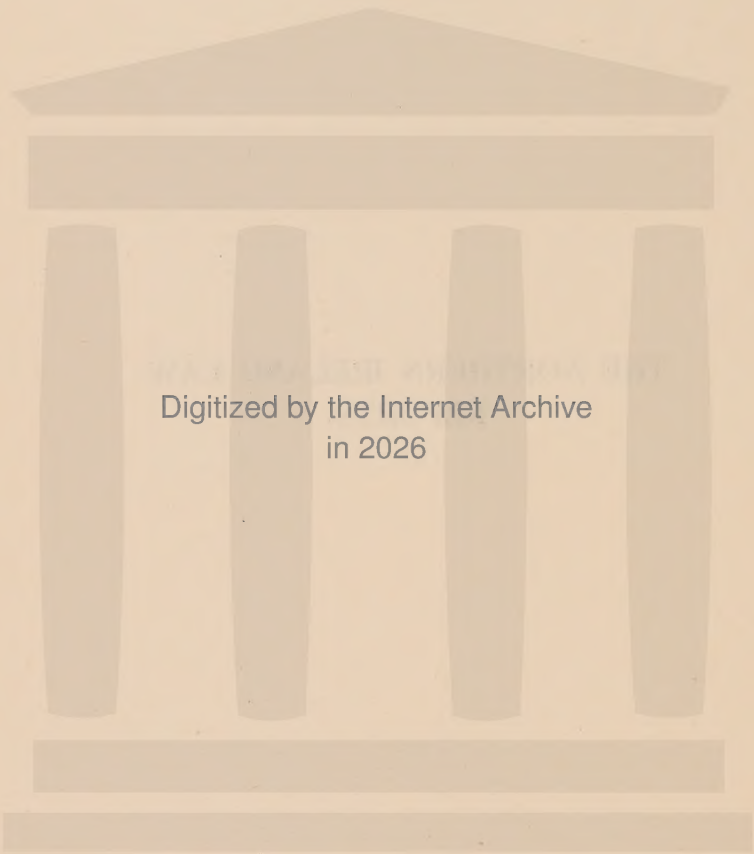

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THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

MARCUS D. BEGLEY,

ONE OF HIS MAJESTY'S COUNSEL

1934.

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Lord Chief Justice:

THE RIGHT HON. SIR WILLIAM MOORE, BART.

Lords Justices of Appeal:

THE RIGHT HON. JAMES ANDREWS.
THE RIGHT HON. RICHARD BEST.

Chancery Division:

THE HON. ROBERT DICK MEGAW.

King's Bench Division:

THE RIGHT HON. SIR WILLIAM MOORE, BART.
THE RIGHT HON. THOMAS WATTERS BROWN.

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Attorney General:

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CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND.

REX (MURPHY) v. CHAIRMAN AND JUSTICES OF THE PEACE FOR THE COUNTY OF TYRONE (1).

K.B.D. 1933. Jan. 26. April 24.

C.A. 1933. June 6.

Husband and Wife—Maintenance Order—Enforcement by Committal—Jurisdiction of Justices—Married Women (Maintenance in Case of Desertion) Act, 1886 (49 & 50 *Vict.*, *c.* 52), *s.* 1—*Bastardy Laws Amendment Act*, 1872 (35 & 36 *Vict.*, *c.* 65).

By section 1 of the Married Women (Maintenance in Case of Desertion) Act, 1886, which applied to England, Wales and Ireland, an Order made thereunder was to be enforced against the husband "in the same manner as the payment of money is enforced under "an order of affiliation." When the statute was passed there was no affiliation procedure in Ireland. In England, however, such Order could be enforced by committal under the Bastardy Laws Amendment Act, 1872.

Held, by the Court of Appeal (affirming the decision of the King's Bench Division, Moore, L.C.J., and Brown, J.) that Magistrates had power to enforce the payments under the Maintenance Order against the husband in the same manner as in England, *i.e.*, by Committal.

Bradley v. District Justice of Bray (2) *disapproved.*

CERTIORARI.

A maintenance order was made against the defendant, Thomas Murphy, on 20th October, 1932; and, as the defendant failed to comply with that order, the magistrates made a further order on 15th

(1) In the Court of Appeal before Andrews and Best, L.JJ.
(2) [1932] I.R. 386.

K.B.D. 1933.

REX (MURPHY) v. JUSTICES OF TYRONE.

December, 1932, committing him to prison. On 16th December, 1932, a conditional order was made removing into the King's Bench Division the order of 15th December, 1932, for the purpose of being quashed.

Maginess for the prosecutor :—

The Justices have no power to enforce payments under a maintenance order by committal. At the time of the passing of the Act of 1886 there was no procedure to enforce an affiliation order in Ireland, and such an order was unknown in this country. The Bastardy Laws Amendment Act, 1872, only applied to England and *primâ facie* in the application of the Act of 1886 to Ireland in so far as it provides that orders made under that Act shall be enforced in the same manner as affiliation orders are enforced, it means in the same manner as affiliation orders are enforced in Ireland. The Act of 1886 in so far as it is sought to apply it to this country is nugatory. [He referred to *Bradley v. District Justice of Bray* (1)].

The *Attorney-General* (*A. B. Babington, K.C.*) and *Dougherty* for the respondents :—

Since the passing of the Act of 1886 the English procedure has been followed.

The Court has power to construe the words used in a Statute and should if possible give some effect to the Act of 1886. The addition of the words " in England " after the word " affiliation " is not necessary to make the section enforceable in Ireland.

The decision in *Bradley v. District Justice of Bray* (1), is not binding on this Court. The provisions of the Bastardy Laws Amendment Act, 1872, are incorporated by reference into the Act of 1886. This is a civil remedy and unless there is a power of imprisonment there is no means of enforcing it in this country.

In *Rex* (*Fleming*) *v. Justices of Armagh* (2), the jurisdiction of the justices to enforce orders made under the Act of 1886 by imprisonment was admitted.

[They also referred to *Rex* (*Redding*) *v. Swifte* (3).]

(1) [1932] I.R. 386.
(2) Unreported.
(3) [1909] 2 I.R. 302.

MOORE, L.C.J., delivered the judgment of the Court.

In this case Mr. Justice Brown and I at the end of the arguments had arrived at an agreed conclusion that, inasmuch as we were informed that it had come before the High Court in the Free State, we thought it would be respectful to adjourn our own formal judgment until we had considered the grounds on which that Court relied. We have now done so, but I am afraid that we do not find them altogether convincing.

Under the Married Women (Maintenance in Case of Desertion) Act, 1886, an order thereunder was to be made enforceable against the husband "in the same manner as the payment of money is enforced under an order of affiliation." That Act applies both to England and to Ireland, but at the time of its passing, there was no machinery in Ireland itself for the enforcement of such an order, nor did the right exist at that date. Such orders were habitually made in England as set out in the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict., c. 65). That Act does not apply to Ireland. The Free State Court held that inasmuch as that Act did not apply to Ireland, there was a *casus omissus* or *lapsus pennæ* on the part of the draughtsman of the Statute. The reason why such views do not commend themselves to us are to be found in the recognized rules of construction. This is not a taxing Statute. Unless some obvious repugnance, absurdity, hardship or injustice is involved by our construction, we cannot assume that Parliament intended anything else but what it said and I think this goes to the very root of the matter. Nor dare we assume when the Statute of 1886 was passed that Parliament was unaware that affiliation orders as such did not exist in Ireland. If, therefore, it must be assumed, as I do assume, that Parliament at that time knew the state of the law in Ireland, it would be the same thing as if they had inserted in the Act "in the same manner as the payment of money is enforced in an order of affiliation in England." The procedure would be new for Ireland, and newly adapted from the

K.B.D. 1933.

REX (MURPHY) v. JUSTICES OF TYRONE.

SIR WILLIAM MOORE, L.C.J.

Act of 1872 for England. Suppose this had been done, there could have been no doubt whatsoever that the section was applying the English procedure to Ireland for the first time. In *Income Tax Special Commissioners v. Pemsel* (1), a question as to whether the word "charitable" in Scotland in a United Kingdom Income Tax Act had a peculiarly Scotch technical meaning or a general meaning according to the law of England, Lord Macnaghten, quoting Lord Hardwicke, said that you must take the meaning of legal expressions from the law of the country to which they properly belong, and in any case arising in the sister country you must apply the statute in an analogous or corresponding sense, so as to make the operation and effect of the statute the same in both countries, and continued, "Thus you get what Lord "Hardwicke calls 'a consistent, sensible construction.' "A simpler plan is now recommended. Though the "words have a definite legal meaning in England, you "must not, it is now said, look at that meaning unless "it be in vogue north of the Tweed. You must put "out the light you have, unless it penetrates directly "to the furthest part of the room. That was not "Lord Hardwicke's view. He seems to have thought "reflected light better than none."

At page 578 the learned Lord had said when you find a special meaning assigned to a particular word in an Act of Parliament you must abide by that meaning in construing the Act, you cannot add to it or take away from it, nor can you substitute anything else for it.

Further, we do not feel that we are dealing with this matter entirely *de novo*. In the case of *Rex (Fleming) v. Justices of Armagh*, not reported and the only note of which appears at p. 642 of Vol. ii, 2nd edit., of O'Connor's *Irish Justice of the Peace*, which report we had further supplemented with information from Mr. Overend, K.C., who was Junior Counsel in that case. Lord O'Brien, L.C.J., arrived at the same conclusion. Such decision would be binding on us so far as we could possibly follow it, and we think we ought not to alter

(1) 1891 A.C. 531.

the practice which has existed since the Statute was passed for over fifty years unless the matter is made clear beyond a doubt.

For these reasons we allow the cause shown but we do not think it is a case in which the Crown should ask for costs.

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REX (MURPHY) v. JUSTICES OF TYRONE.

SIR WILLIAM MOORE, L.C.J.

The prosecutor appealed to the Court of Appeal.

Maginess for the prosecutor:—

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June 6.

The order for the committal of the prosecutor was made by the Justices without jurisdiction. The Act of 1886 applied both to England and to Ireland, but at the time of the passing of the Act there was no jurisdiction in Ireland to make an affiliation order. In England affiliation orders were enforced by the procedure set out in the Bastardy Laws Amendment Act, 1872. *Primâ facie* in the application of the Act of 1886 to Ireland it must be taken as meaning that an order under section 1 sub-section 1 is to be enforced in the same manner as the payment of money under an order of affiliation is enforced in Ireland. The Act is unenforceable in so far as it is sought to apply it to this country. Where an Act is nugatory according to the ordinary canons of construction the Court may not add to it nor take away from it in order to give it a meaning.

[He referred to *Cox v. Hakes* (1).]

It was decided in *Bradley v. District Justice of Bray* (2), that the Act of 1886 was not enforceable by committal in Ireland. *Rex (Fleming) v. Justices of Armagh* (3), apparently was decided without argument.

This is a penal clause and must not be implied except under the clearest terms.

Counsel for the Crown were not called upon by the Court.

ANDREWS, L.J.

ANDREWS, L.J.: The question to be decided in this case is whether the magistrates have jurisdiction

(1) 15 A.C. 506.
(2) [1932] I.R. 386.
(3) Unreported.

C.A. 1933.

REX (MURPHY) v. JUSTICES OF TYRONE.

ANDREWS, L.J.

under the Married Women (Maintenance in Case of Desertion) Act, 1886, to enforce orders made by them under the Act by imprisonment.

(His Lordship having stated the facts continued.)

The matter turns on the construction which should be placed upon section 1 of the Act of 1886. By that section it is provided that:—"From and after the "passing of this Act it shall be lawful for any married "woman, who shall have been deserted by her husband, "to summon her husband before any two justices in "petty sessions or any stipendiary magistrate, and "thereupon such justice or magistrate, if satisfied that "the husband, being able wholly or in part to maintain "his wife or his wife and family, has wilfully refused "or neglected to do so, and has deserted his wife, may "order:—

"(1) That the husband shall pay to his wife such "weekly sum not exceeding two pounds as the justices "or magistrates may consider to be in accordance with "his means and with any means that the wife may "have for her support and the support of her family, "and the payment of any sum so ordered shall be "enforceable and enforced against the husband in the "same manner as the payment of money is enforced "under an order of affiliation. . . ."

Now it is admitted that when that statute was passed in 1886 there was no affiliation procedure in this country and, accordingly, no means of enforcing any such order. In England, on the other hand, where affiliation proceedings could be taken, such an order could be enforced by committal under the Bastardy Laws Amendment Act, 1872. Was it the intention of the Legislature in passing the Act of 1886 to extend and apply to Ireland the remedy which, in affiliation cases, unquestionably existed in England? To answer this question we should in the first place consider the area to which the Act of 1886 applied. By section 4 it is enacted that this Act shall not apply to Scotland. In my opinion by thus excluding Scotland the Legislature constituted a single territorial unit of England, Wales and Ireland, wherein and in every part of which an order made under the Act should be enforceable by the procedure indicated

by the Act, even though that procedure had previously only applied to a part of that territorial unit. It is simply a case of legislation by reference. It is not disputed that this view was generally accepted by the magistrates from the time when the Act was passed, and a practice was adopted of making such committal orders in proper cases. This practice does not seem to have been seriously disputed until *Rex (Fleming) v. Justices of Armagh* (1). In my opinion a practice of such long standing should not lightly be interfered with, though it must be admitted that, if clearly unwarranted, it should not be permitted to be continued. When the question was raised before Lord Chief Justice O'Brien in *Rex (Fleming) v. Justices of Armagh* (1), Mr. O'Connor (later Lord Justice O'Connor) seems to have admitted that he had no case, and that the jurisdiction undoubtedly existed. This practice continued without further question until 1932. Then in *Bradley v. District Justice of Bray* (2), the matter came before the High Court of the Irish Free State. I have considered carefully the grounds relied upon by the judges in that case and I regret that I am unable to accept them. Mr. Justice Hanna assumed the existence of a two-fold jurisdiction, one for England and one for Ireland. I feel convinced that if such was the intention of the Imperial Parliament legislating for both areas, every part of which was then included in the United Kingdom, the Act would have contained words clearly expressive of such an intention. Moreover such a construction, if adopted, would render the Act, so far as it applies to Ireland, nugatory, as orders made under it would be incapable of enforcement. This is one of the last constructions which should be placed upon a statute. Moreover, if it is necessary to read the words "in England" into the section after the word "affiliation" in order to render the Act applicable to this country, I feel no more difficulty in doing so than in reading the same words into the section after the word "enforced," which is the necessary effect of the judgment in *Bradley v. District Justice of Bray* (2).

(1) Unreported. (2) 1932 I.R. 386.

C.A. 1933.

REX (MURPHY) *v.* JUSTICES OF TYRONE.

ANDREWS, L.J.

In my opinion the jurisdiction to enforce these payments by imprisonment exists, and the decision of the King's Bench Division should be affirmed.

BEST, L.J.: I agree.

Solicitors for the prosecutor: *Shields & Murnaghan.*
Solicitor for the respondents: *Chief Crown Solicitor.*

J. R.

MULLIGAN v. MULLIGAN (1).

C.A. 1933.

(1932. No. 3283.)

April 26. May 18.

Practice—Procedure—Costs—Negligence—Joinder of two defendants —Verdict against one defendant and in favour of the other defendant—Jurisdiction to order unsuccessful defendant to pay successful defendant's costs to plaintiff—"Special cause" for costs not following event—Judicature Act (Ireland), 1877 (40 & 41 Vict., c. 57), section 53—Rules of the Supreme Court (Ireland), 1905, Order LXV., r. 4—Exercise of discretion.

The plaintiff was injured by a collision between two vehicles, a motor car belonging to the defendant M., and a motor hackney cab belonging to the defendant McC., and brought an action for damages against both defendants. He was a passenger in the defendant M's. car.

The plaintiff claimed alternatively that the accident was due to the negligence of each defendant, or to the negligence of the defendants jointly. The defendant McC. denied negligence, and alleged contributory negligence on the part of M., whilst M. denied negligence and pleaded that any damage suffered by the plaintiff was caused solely by the negligence of the defendant McC.

The defendant McC., had by letter maintained that M's. car was entirely responsible for the damage.

The action was tried by the Lord Chief Justice and a special jury who found that the accident was caused by the negligence of the defendant M. alone, and damages were assessed at £200.

The Lord Chief Justice gave judgment for the plaintiff against the defendant M. for that sum and costs, and he also gave judgment for the defendant McC. against the plaintiff with costs. He refused the plaintiff's application for an order declaring the plaintiff entitled to be indemnified by the defendant M. against the costs ordered to be paid by the plaintiff to the defendant McC. He, however, gave the plaintiff special liberty to appeal on the question of costs.

On a motion brought by the plaintiff to vary the Lord Chief Justice's order:—

Held, by the Court of Appeal (Andrews and Best, L.JJ.), that in such a case the Court had jurisdiction to order the plaintiff to pay the costs of the successful defendant, and then to add those costs to the costs which the unsuccessful defendant was ordered to pay to the plaintiff.

Held also, that it was reasonable and proper to join both defendants in the action and that the Court had discretion to make the order which the plaintiff asked for.

(1) In the Court of Appeal before Andrews and Best, L.JJ.

C.A. 1933.

MULLIGAN v. MULLIGAN.

Held further, that such an order should only be made in a proper case by which is meant a case where the plaintiff has in the opinion of the Court or a Judge acted reasonably in joining the successful defendant as a party to the action.

MOTION to vary judgment of Moore, L.C.J., at the trial of the action with a special jury.

The action was brought to recover damages for injuries sustained by the plaintiff through a collision between a motor car and a motor hackney cab. The plaintiff, John Mulligan, sued his brother, the defendant, Francis Mulligan, and the defendant, John McConnell, for damages for negligence. The action arose out of an accident which occurred on 27th June, 1932, when the defendant, Mulligan's car, in which the plaintiff was a passenger, came into collision with McConnell's motor hackney cab.

In his statement of claim the plaintiff alternatively pleaded that the accident was due to the negligence of each defendant and also to the negligence of the defendants jointly.

McConnell denied that he was guilty of negligence and alleged contributory negligence, whilst Mulligan, in addition to denying negligence, pleaded that if the plaintiff suffered injury or damage the same was caused solely by the negligence of the defendant McConnell.

The defendant McConnell had by letter maintained that Mulligan's car was entirely responsible for the damage.

At the trial the jury found that the accident was caused by the negligence of the defendant Mulligan alone, and they assessed damages at £200. The Lord Chief Justice gave judgment for the plaintiff against the defendant Mulligan for that sum and costs, and he also gave judgment for the defendant McConnell against the plaintiff with costs.

An application on behalf of the plaintiff for an order declaring the plaintiff entitled to be indemnified by the defendant Mulligan against the costs ordered to be paid by the plaintiff to the defendant McConnell was refused, with liberty to appeal.

The matter came before the Court of Appeal on two Notices of Motion. The first was by the defendant Mulligan for an order that the judgment in favour of the plaintiff against him be set aside and a new trial ordered on the ground that the findings of the jury were against the evidence and the weight of evidence. The second Notice, which was served on behalf of the plaintiff, asked that the judgment should be varied in so far as it refused an order declaring the plaintiff entitled to be indemnified by the defendant Mulligan against the costs ordered to be paid by the plaintiff to the defendant McConnell.

The grounds of this Notice were that there were no materials upon which the Lord Chief Justice's discretion as to costs could be exercised judicially in the way that it had been exercised, and that the grounds assigned by the Lord Chief Justice against allowing the costs were not grounds which in law and in the circumstances of the case justified him in so exercising his discretion.

When the matter came on for hearing before the Court of Appeal it was admitted on behalf of the defendant Mulligan that he could not succeed on his application for a new trial, that it must be refused, and that the defendant Mulligan must pay the costs of the hearing before the Court of Appeal to the defendant McConnell.

McGonigal, K.C.; Beattie, K.C., and *Fox*, for the defendant Francis Mulligan:—

We admit that we cannot succeed in our application for a new trial and that it must be refused, the defendant Mulligan paying the costs of the present hearing to the defendant McConnell. As to the plaintiff's motion to vary the Lord Chief Justice's order, we contend that an important question of jurisdiction is involved. We maintain that neither the trial Judge nor the Court of Appeal has any power to make the order sought.

The only control which the Judge has is to direct for special cause shown, that costs which in the ordinary

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way would follow the event, should not follow the event. The law in England is quite different. The Supreme Court of Judicature Act, 1890, applies to England only. But for this Act, the English Courts would not have had power to make such an order. The English Judicature Act was not at all the same as the Irish. Even if there is jurisdiction, no one but the trial Judge could make the order. He is bound, unless special cause has been shown and mentioned in the order to let the costs follow the event, and could only make the order as between the plaintiff and defendant. There was nothing to appeal against unless the Judge at the trial had taken the costs out of the general rule.

[They also referred to Judicature Act (Ireland), 1877, section 53, Rules of the Supreme Court (Ireland), 1905, Order LXV., r. 1, *Sanderson v. Blyth Theatre Co.* (1), *Bullock v. London General Omnibus Co.* (2), and *Little v. Dublin Tram Co.* (3).]

T. J. Campbell, K.C.; E. S. Murphy, K.C., and *McSparran*, for the plaintiff:—

This is essentially a case in which the order asked for by the plaintiff, should be made. In this case there was special cause for making the order. The argument on jurisdiction is based on the difference between the English and the Irish Judicature Acts.

We submit that the distinction attempted to be made in argument does not exist. Both *Sanderson v. Blyth Theatre Co.* (1), and *Bullock v. London General Omnibus Co.* (2), contained those very words which are to be found in the Irish Judicature Act, and in Order LXV., r. 1. The English Judicature Act of 1873 contains no section dealing with costs.

We rely on *Besterman v. British Motor Cab Co., Ltd.* (4). That was a case where a plaintiff who was injured in a collision between a motor cab and an omnibus joined the owners of both vehicles as defendants in an action to recover damages for injuries sustained. He obtained a verdict with damages against

(1) [1903] 2 K.B. 533.
(2) [1907] 1 K.B. 264.
(3) [1929] I.R. 642.
(4) [1914] 3 K.B. 181, 187.

the motor cab company, but the omnibus company obtained a verdict in their favour. The Judge made an order for payment to the plaintiff by the motor cab company of the plaintiff's costs against the omnibus company and of the costs which the omnibus company recovered against the plaintiff.

It was held that the Judge had a discretion to make the order, although before the issue of the writ the motor cab company had not intimated to the plaintiff their intention to throw the responsibility for the accident on the other defendants.

In that case Vaughan Williams, L.J., said in the course of his judgment: "I would wish in most "emphatic terms to protest against this idea of the "right to ask the question, 'Are you going to blame "'your co-defendant?' It cannot be done. The "proper way is—do not join any defendant un- "reasonably; if the facts are such that it is reasonable "to join them both and reasonable to be in a state of "uncertainty as to which of the two is the really "guilty one, then it is part of the reasonable costs of "the action that the costs of the action which you "have launched against one of these defendants, and "who has succeeded in defending himself, should be "borne by the man who is to blame."

The Supreme Court of Judicature Act, 1890, was passed subject to the rules and to the other English Acts. The costs reasonably and properly incurred include the costs of the successful defendant.

We challenge the statement that the English Courts have a jurisdiction not possessed by the Courts in Northern Ireland. The decision arrived at by Fitzgibbon, J., and Murnaghan, J., in *Little v. Dublin Tram Co.* (1), is clearly wrong. There are, however, we submit statements in Murnaghan, J.'s judgment which are entirely inconsistent with the decision arrived at by him, and which are in favour of the plaintiff in the present action. Taking Murnaghan, J.'s judgment as a whole, we submit that it is impossible to suggest that there was a decision of the majority of the Court in *Little v. Dublin Tram Co.* (1) against the contention of the plaintiff in the present action.

(1) [1929] I.R. 642.

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The fact that Kennedy, C.J., delivered a dissenting judgment also weakens the authority of the decision of the Court in *Little v. Dublin Tram Co.* (1).

The settled practice of the Court should not be disturbed unless it is shown to be wrong. This Court has the same power to deal with the application as the trial Judge had, otherwise an order made by the Court as to costs would be purely nugatory. Reference has already been made to the long chain of cases in England in favour of the plaintiff's contention.

[They also referred to *Mulhern v. National Motor Cab Co.* (2), *Vine v. National Cab Co.* (3), *In re Fisher* (4), *In re Wrexham, Mold and Connah's Quay Railway* (5), *The "Esrom" and the "Hopper" Wills No.* 66 (6), *Rudow v. Great Britain Mutual Life Assurance Society* (7), and *Robinson v. Drakes* (8).]

McGonigal. K.C. (in reply):—

In *Whitmore v. O'Reilly* (9), where the judge had exercised his discretion of ordering the plaintiff to pay the defendant's costs, it was held by the King's Bench Division and by the Court of Appeal that the Judge's order in this respect was not subject to review.

The jurisdiction we are dealing with is entirely statutory. There is no general jurisdiction independent of statute.

We submit that there is no power to order that costs which have followed the event should be added to plaintiff's costs and paid to the successful defendant. *Besterman v. British Motor Cab Company, Limited* (10), did not reverse *Sanderson v. Blyth Theatre Co.* (11), and *Bullock v. London General Omnibus Co.* (12).

Nothing similar to the Supreme Court of Judicature Act, 1890, exists in Ireland. We contend that no statutory jurisdiction exists for the order. The only power is to make an order for special cause shown. The Chancery cases do not assist the Court.

(1) [1929] I.R. 642.
(2) 29 T.L.R. 677.
(3) 29 T.L.R. 311.
(4) [1894] 1 Ch. 450.
(5) [1900] 1 Ch. 261.
(6) [1914] W.N. 81.
(7) 17 Ch. D. 600.
(8) 23 Ch. D. 98.
(9) [1906] 2 I.R. 357.
(10) [1914] 3 K.B. 181.
(11) [1903] 2 K.B. 533.
(12) [1907] 1 K.B. 264.

We submit that taking into consideration the statute and the rules, there is no jurisdiction to make the order asked for.

ANDREWS, L.J.: In this case the plaintiff, John Mulligan, sued his brother, the defendant Francis Mulligan, and the defendant John McConnell, for damages for negligence. The action arose out of an accident which occurred on 27th June, 1932, when the defendant Mulligan's car, in which the plaintiff was a passenger, came into collision with McConnell's car. In his statement of claim the plaintiff alternatively pleaded that the accident was due to the negligence of each defendant and also to the negligence of the defendants jointly. The defence of McConnell consisted of traverses and an allegation of contributory negligence, whilst that of Mulligan, in addition to traverses, contained a plea that if the plaintiff suffered injury or damage the same was caused solely by the negligence of the defendant McConnell.

The action was tried by the Lord Chief Justice and a special jury who held that the accident was caused by the negligence of the defendant Mulligan alone, and damages were assessed at £200. The Lord Chief Justice gave judgment for the plaintiff against the defendant Mulligan for that sum and costs, and he also gave judgment for the defendant McConnell against the plaintiff with costs. The application by counsel on behalf of the plaintiff for an Order declaring the plaintiff entitled to be indemnified by the defendant Mulligan against the costs ordered to be paid by the plaintiff to McConnell was refused, with liberty to appeal.

The matter was brought before this Court on tow Notices of Motion. The first was by the defendant Mulligan for an Order that the judgment in favour of the plaintiff against him be set aside and a new trial ordered on the ground that the findings of the jury were against evidence and the weight of evidence. The second Notice, which was served on behalf of the plaintiff, asked that the judgment should be varied in so far as it refused an Order declaring the plaintiff

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entitled to be indemnified by the defendant Mulligan against the costs ordered to be paid by the plaintiff to the defendant McConnell. The grounds of this Notice were that there were no materials upon which the learned Judge's discretion as to costs could be exercised judicially in the way that it had been exercised, and that the grounds assigned by the learned Judge against allowing the costs were not grounds which in law and in the circumstances of the case justified him in so exercising his discretion. In short, that the discretion was not exercised judicially, but on a wrong principle.

When the matter came on for hearing before us Mr. McGonigal, for the defendant Mulligan, admitted that he could not succeed on his application for a new trial, and agreed that it must be refused, and also that his client should pay costs of the hearing before us to the defendant McConnell. In regard to the cross notice seeking the indemnity order against his client in respect of the costs ordered to be paid by the plaintiff to the defendant McConnell, he raised an important question of jurisdiction, submitting that neither the trial Judge nor this Court had any power to make the Order sought. Alternatively, he contended that if any power existed to make the order it was a condition precedent to its exercise that " special cause " should be held to exist, and that the facts would not have warranted any such conclusion. I shall deal first with the question of jurisdiction, and later with the alleged wrongful exercise of discretion by the learned Judge.

On the question of jurisdiction we were referred by counsel to the relevant provisions of the Irish and English Judicature Acts and of the Rules of Court made thereunder, as also to the principal authorities in both England and Ireland. In particular our attention was directed to the most recent case on the point, which was decided by the Supreme Court of the Irish Free State—*Little v. Dublin United Tramway Co.* (1). I regret that I have derived but little assistance from the various authorities cited, all of which I have studied with the utmost care ; for the English cases were decided on statutes and rules, which,

(1) [1929] I.R. 642.

though similar to, are by no means identical with ours; and *Little's* case (1) loses the weight which would otherwise be attached to the decision by the fact that, as I read it, all three Judges took different views. In the circumstances I prefer to go back in the first instance to the statutes and rules as the safest guide to our decision.

By section 53 of the Judicature Act (Ireland), 1877, it is provided, so far as is material, as follows:—

"Subject to the provisions of this Act and of Rules of "Court, the costs of and incident to every proceeding "in the High Court of Justice and Court of Appeal, "respectively, shall be in the discretion of the Court ". . . .; Provided that (subject to all existing "enactments limiting, regulating, or affecting the "costs payable in any action by reference to the "amount recovered therein), the costs of every action, "question, and issue tried by a jury shall follow the "event, unless, upon application made, the Judge at "the trial or the Court shall for special cause shown "and mentioned in the order otherwise direct; and "any order of a Judge as to such costs may be dis-"charged or varied by a Divisional Court . . ."

Then follows this second paragraph:—

"Where in any proceeding in the High Court of "Justice or Court of Appeal the costs of any party "to the proceeding are ordered to be paid or borne "by another party to the proceeding . . ., "those costs shall, if the Court so directs, include, "in addition to the costs now allowed on taxation "as between party and party, all or any other costs, "charges and expenses reasonably incurred for the "purposes of the proceeding. . . ."

Order 65, r. 1, is in all material respects identical with the section which I have just cited, and, accordingly, it need not be separately considered.

Now what is the legal effect of the section so far as is material for this case? In the first place, we find the general principle declared that the costs of every "proceeding" shall be in the discretion of the Court. Secondly, we find a limitation placed on this general

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discretionary power in the case of trial by jury; for in such case the costs of every "action, question, and issue" must follow the event, unless otherwise directed "for special cause." In the third place, there is conferred upon the Court a power where in any proceeding the costs of any party are ordered to be paid by another party to include in such costs in addition to costs allowed on party and party taxation "all or "any other costs, charges and expenses reasonably "incurred for the purposes of the proceeding."

Each of these three provisions of the section must be separately considered. It is only when so subdivided and considered that one is able to avoid a confusion of thought which is, in my opinion, to be found in some of the reported cases. Thus the view has more than once been expressed that the Judge or Court can only make the indemnity order sought in the present case when "special cause" has been shown and mentioned in the order. In my opinion this is an incorrect view. The provision as to special cause relates, not to the making of an indemnity order, but to any direction that the costs of an action, question, or issue should not follow the event. Thus, in the present case, if the defendant Mulligan who failed had not been ordered to pay costs to the plaintiff, or if the plaintiff had not been ordered to pay costs to the successful McConnell, it would have been necessary that "special cause" should have been shown and mentioned in the order. Neither event has, however, happened. As between the plaintiff and the respective defendants costs have followed the event; and, accordingly, no finding of "special cause" is necessary. There was no action, question, issue, or event directly between the defendants; and jurisdiction to make what Collins, M.R., has called a "superadded order"—that the defendant Mulligan should recoup the plaintiff the amount paid to McConnell by allowing him to add it to his own costs—is, in my opinion, in no way dependent on the existence of "special cause."

My colleague, Best, L.J., finds the necessary jurisdiction to make the special order sought in the general discretionary power over costs contained in the opening

words of section 53, as it applies in terms to the costs of and incident to every "proceeding." Whilst I do not wish to express real dissent from this view, as a matter of construction I have some difficulty in bringing an action or proceeding within this general discretionary power, when, being a jury case, it unquestionably falls within the proviso. Certainly it would appear to me that the general discretionary power could not apply unless and until the case has been taken out of the proviso by the finding of "special cause" as a reason why costs should not follow the event. In fact no such finding has been or could be sought, as the costs have been directed to follow the event in a portion of the order which is not now under appeal. Personally, I find the necessary jurisdiction to make this special order as to costs more clearly in the concluding paragraph of the section, which, as applied to the present case, I read as follows: "Where . . . the costs of any party" (*i.e.*, the plaintiff) . . . "are ordered to be paid . . . by "another party" (*i.e.*, the unsuccessful defendant Mulligan) . . . "those costs shall, if the Court so "directs, include, in addition to the costs now allowed "on taxation as between party and party, all or any "other costs, charges and expenses reasonably incurred "for the purposes of the proceeding" (*i.e.*, the costs of the successful defendant McConnell, provided they were "reasonably incurred"). No doubt it may be said that the costs so "included," and to which the section was possibly primarily directed, would in most cases be the ordinary solicitor and client costs of the successful party; but the words of this part of the section are, in my opinion, wide enough to include the costs of a successful defendant ordered to be paid by the plaintiff provided it was a reasonable thing that he should have been joined as a defendant, and that liability for them should have been thus incurred. This view is in my opinion supported by the use of the words "*any* party" and "*another* party" not "*the* other party," showing that the draftsman of the section had clearly in his mind an action between more than two parties. It also derives strength from the fact that the reference to

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costs, etc., "reasonably incurred" is not expressly restricted or limited in any way to costs incurred by the party in whose favour the Order of the Court is made. But, if it be said that the section must be construed as if the words "by such party" were inserted in the section after the words "reasonably "incurred," authority is not wanting in support of the view that costs which in the circumstances the plaintiff is compelled to pay to a successful defendant were "reasonably and properly *incurred by the plaintiff* "as between him and the last-named (*i.e.*, the un- "successful) defendant." See judgment of Romer, L.J., in *Sanderson v. Blyth Theatre Co.* (1), adopted by Cozens Hardy, L.J., in *Bullock v. London General Omnibus Co.* (2), and by Swinfen Eady, L.J., in *Besterman v. British Motor Cab Co., Ltd.* (3).

However, if any doubt or ambiguity exists in the construction of the section as to the jurisdiction of the trial Judge or Court therein contained, the matter ought to be determined in my opinion by what I believe to be the long-standing and well-established practice of our Courts which should not be lightly interfered with. In the 1906 Edition of Wylie's Judicature Acts, p. 874, Notes to Or. 65, r. 1, which, as I have stated, is in terms practically identical with section 53, there appears the following note :—"Where two defendants "are sued in the alternative and plaintiff succeeds "against one and fails against the other, the Court "may order that the plaintiff pay the successful "defendant his costs and have them over against the "other, or in a case tried without a jury order the "unsuccessful defendant to pay the other his costs, "*Sanderson v. Blyth Theatre Co.* (4), but this decision "is partly based on section 5 of the Supreme Court of "Judicature Act, 1890, which applies to England only ; "see, however, Judicature Act, s. 53 *ante*." From this note there can be no doubt that, whilst the learned author rightly considered that the decision in the English case turned in part on the English Statute of 1890, he was also of opinion that a similar jurisdiction

(1) [1903] 2 K.B. 539.
(2) [1907] 1 K.B. 272.
(3) [1914] 3 K.B. 191.
(4) [1903] 2 K.B. 533.

existed in Ireland by reason of the provisions of section 53 of the Act of 1877. Orders of this character were, I believe, occasionally made in Dublin prior to the setting up of the Courts of the Irish Free State; and the fact that there is no reported case on the point during these years only confirms my opinion that it was accepted as settled practice. Since the establishment of our High Courts of Justice in Northern Ireland such Orders have been made on at least three occasions without the jurisdiction to make them being challenged. In *Blakely v. Tinsley & McCausland*, 1921 No. 262 (1), Wilson, J., on the findings of the jury, gave judgment for the defendant McCausland with costs and for the plaintiff against the defendant Tinsley with costs "and for such costs as the plaintiff has to pay to the "defendant McCausland"; as he held as a fact, for reasons which he mentioned, that the action against the defendant McCausland by the plaintiff was really brought in the interest of defendant Tinsley, if not at his instigation. Again in *Henderson v. Martin & Barron*, 1926, No. 4870 (2), Brown, J., on the findings of the jury, gave judgment for the plaintiffs against the defendant Martin, and gave judgment for the defendant Barron against the plaintiffs with costs; and, holding that the defendant Barron was introduced into the action solely by the false allegations made by the defendant Martin as to the liability of Barron for the accident, the learned Judge ordered "that the "plaintiffs do have such costs as are payable by them "to James Barron under this judgment over against "the defendant Robert Martin in addition to their "costs of the action against him." Finally, in *McGucken v. Kennedy, Hamilton & Morgan* (3), the Lord Chief Justice, after being referred to the above two unreported cases, made an Order that the costs paid by the plaintiff to the successful defendant should be included in the costs recoverable by the plaintiff against the unsuccessful defendants. An appeal was taken to this Court by these latter defendants, one of whom was represented by Counsel, Mr. Beattie, whilst

(1) Unreported.
(2) Unreported.
(3) [1928] N.I. 54.

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the other did not appear. On the case being called Mr. Beattie stated that he had come to the conclusion that the appeal could not be sustained, and, accordingly, as the Report states, the Court (consisting of my colleague, Best, L.J., and myself) "affirmed the Order "of the Lord Chief Justice (without argument) with "costs." The fact that Mr. Beattie declined to proceed with his Appeal and that the Order was affirmed without argument makes the case valueless as an authority by this Court on the question of jurisdiction; and we would not under the circumstances consider ourselves bound by the case if, after argument, we considered that we had been induced to make a wrong Order by reason of the attitude assumed by counsel. But, having heard full argument in this case, we are both of opinion that there was ample jurisdiction for making the Order; and the Report is certainly of value in so far as it preserves a record of three cases in which different Judges have made such Orders since the establishment of our Courts less than twelve years ago.

As regards the English cases, the principal of which are *Sanderson v. Blyth Theatre Co.* (1), *Bullock v. London Omnibus Co.* (2), and *Besterman v. British Motor Cab Co., Ltd.* (3), I would only wish to say that on the English Statutes and Rules as they existed when the cases were decided the jurisdiction to make such an Order as that now in question was, in my opinion, clearly established. Whilst it is true that neither Statutes nor Rules were identical in the two countries, and whilst it is admitted that the English Act of 1890, which confers a wide discretionary power upon the Court, and upon which the decisions largely turned, does not apply to Ireland; yet, by reason of the wide terms of section 53 of our Act of 1877, to which there is no corresponding provision in the English Act of 1873, there is, in my opinion, no such difference between the Statutes and Rules of the two Countries, when their provisions are respectively taken and read together, as would warrant the conclusion that the English

(1) [1903] 2 K.B. 533.
(2) [1907] 1 K.B. 264.
(3) [1914] 3 K.B. 181.

cases should be regarded as of no authority in this Country. I think Fitzgibbon, J., must share this view, for in *Little v. Dublin United Tramway Co.* (1), he finds it necessary to hold (though I do not agree with his view) that these English cases were wrongly decided. In *Little's* case, (1), Hanna, J., holding facts to exist which amounted to "special cause," ordered the unsuccessful defendant to pay to the plaintiff the costs due to the successful defendant by the plaintiff. Kennedy, C.J., was of opinion that there was jurisdiction to make the Order and that special cause existed. Fitzgibbon, J., took the precisely opposite view on both points; whilst Murnaghan, J., shared the Chief Justice's view as to the existence of jurisdiction, but considered that there were "no grounds in the "circumstances of the case" for making the special Order. In this conflict of judicial opinion it is impossible to attach the same weight to the decision as in several other cases I have given to the judgments of the Supreme Court of the Irish Free State.

Holding as I do that the jurisdiction exists both with the trial Judge and with this Court to make the Order sought, the question arises as to whether it should have been exercised in the present case. In my opinion it was a proper case for doing so—Two persons driving motor cars became involved in a collision, as a result of which the plaintiff sustained injuries to which he in no way contributed. Each denied liability, and each, by either letter or pleading, blamed the other. Had the plaintiff sued one of them only, the jury might readily have considered that responsibility lay with the other who was not before the Court and who had not an opportunity of defending himself. This would have involved a second action with further costs, and possibly with a result equally unsatisfactory to the plaintiff. The surest way of finding the pea was by lifting both thimbles at the same time. The plaintiff was entitled by the Rules of Court to bring both of the possible delinquents before the Court in the one action; and, in my opinion, as long as each protested his innocence and blamed

(1) [1929] I.R. 642.

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the other, it was reasonable and proper that he should do so. In these circumstances it is just and reasonable, and, as Swinfen Eady, L.J., said in *Besterman's* case (1), "in the interests of justice," that the costs of the defendant who succeeds in defending himself should be paid by the defendant who is to blame. This is the test which, in my opinion, ought to be applied by a Judge when he is asked to make an indemnity, or, as I would prefer to call it, a recoupment order. It was not the test applied in the present case; for the Lord Chief Justice reports to us that, whilst he thinks the verdict of the jury quite justified, he would have made a like remark had they found joint negligence. If a verdict against McConnell jointly with Mulligan would have been justified on the evidence, it was obviously reasonable that he should have been sued. The grounds upon which the Lord Chief Justice acted in exercising his discretion are stated by him to have been that he had a strong suspicion that the costs might never be really asked for, and, if asked for, that they could not be paid; and that he thought he might possibly be prejudicing the rights of some insurance company or other person not before him, and that it was safer to let matters remain in the ordinary way. In my respectful opinion the plaintiff's Counsel are right in this contention that these are not grounds which in law justified the learned Judge in exercising his discretion as he did. If it seems to me that if possible prejudice to insurance companies is to be a reason why such an Order should not be made, the jurisdiction will become incapable of being exercised in all motor accident cases having regard to the existing law as to compulsory insurance. Moreover, if the suspicion of the Lord Chief Justice, that the costs might never be asked for or paid, be well founded, I do not see how the rights of an insurance company could be prejudiced.

In these circumstances it is our duty to exercise our own discretion; and, as in my opinion it was reasonable that McConnell should be sued, and as the defendant Mulligan denied liability and threw all the blame upon

(1) [1914] 3 K.B. 181, 192.

McConnell, it is just and reasonable and proper that the Order sought should be made. The plaintiff is further entitled to his costs of this appeal to be paid by the defendant Mulligan.

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BEST, L.J.: The question raised by this appeal is whether, in an action in which relief is claimed in the alternative and/or jointly against two defendants, the trial Judge has jurisdiction to order the plaintiff to pay the costs of the successful defendant, and then to add those costs to the costs which the unsuccessful defendant is ordered to pay to the plaintiff.

The action was one for damages for injuries caused by a collision between a motor car driven by the defendant Francis Mulligan and a taxi-cab driven by the defendant John McConnell. It was tried by the Lord Chief Justice and a Special Jury, who found that the injuries to plaintiff were caused by the negligence of the defendant Mulligan alone and not by the negligence of McConnell.

Judgment was entered for the plaintiff against the defendant Francis Mulligan for £200 and the costs of action, and for the defendant John McConnell against the plaintiff with McConnell's costs of the action.

Plaintiff's counsel applied for an order declaring the plaintiff entitled to be indemnified by the defendant Francis Mulligan against the costs by said judgment ordered to be paid by the plaintiff to the defendant John McConnell, which application was refused by the learned Judge, who gave the plaintiff leave, if so advised, to appeal against such refusal.

Notice of motion for a new trial of the action was served on behalf of the defendant Francis Mulligan, and a cross notice by the plaintiff was served asking that the judgment should be varied in so far as it refused an order declaring the plaintiff entitled to be indemnified by the defendant Francis Mulligan against the costs by said judgment ordered to be paid by the plaintiff to the defendant John McConnell.

Mr. McGonigal, K.C., for the defendant Francis Mulligan, intimated that he was not now moving for a new trial, but he proceeded to argue that the Lord

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Chief Justice had no jurisdiction to make the order which at the trial he had been asked by plaintiff's counsel to make, and which is asked for in the cross notice of appeal.

The matter arises on the construction of Section 53 of the Supreme Court of Judicature Act (Ireland), 1877, and the Rules of Court. The section, so far as material, provides that—

> Subject to the provisions of this Act and of Rules of Court, the costs of and incident to every proceeding in the High Court of Justice and Court of Appeal respectively shall be in the discretion of the Court . . . : provided that (. . .) the costs of every action, question and issue tried by a jury shall follow the event unless upon application made, the Judge at the trial or the Court shall for special cause shown and mentioned in the order otherwise direct ; and any order of a Judge as to such costs may be discharged or varied by a Divisional Court. . . .

Mr. McGonigal's argument is that, for special cause shown and set out on the face of the order, the Lord Chief Justice might have deprived McConnell of his costs, but that he had no jurisdiction to make the order asked for at the trial and now sought for in this Court.

The provisions of Order 65, rule 1, of the Rules of the Supreme Court are to the same effect as those contained in the section.

The discretion given to the Court in the opening words of the section is general in character and most comprehensive :—" the costs of and incident to " every proceeding " are to be in its discretion. The words " of and incident to " seem capable of embracing all costs of every description that could be incurred, subject, of course, to the provisions of the Act itself and except as provided by the Rules, and no more general words than " every proceeding " could have been used to describe the nature of the case with which the Court might have to deal. If there had been no proviso to the section, the matter would have been free from difficulty, but there is a proviso that " the costs of every action, question and issue tried

" by a jury shall follow the event unless upon applica-
" tion made, the Judge at the trial or the Court shall
" for special cause shown and mentioned in the order
" otherwise direct." Whatever meanings be assigned to the words " question " and " issue," there was a " question " or an " issue " between plaintiff and each of the two defendants, and, accordingly, as between the plaintiff and each of the defendants separately, costs, in the absence of special cause shown by the trial Judge, rightly followed the determination of the jury that one defendant (McConnell) was not to blame and that the other defendant (Mulligan) was to blame for causing the injuries complained of.

Were the costs which the successful defendant was awarded against the plaintiff in the discretion of the Lord Chief Justice ? Those costs by the terms of the proviso were to follow the event unless for special cause shown and mentioned in his order made at the trial it was otherwise directed. As between the plaintiff and the successful defendant there was no ground for applying for such an order, nor was it in fact applied for. The application that was made on behalf of plaintiff was that he should be at liberty to add to the costs payable to him by the unsuccessful defendant (Mulligan) the costs which he, the plaintiff, had been ordered to pay the successful defendant (McConnell), and that the unsuccessful defendant (Mulligan) should be ordered to pay those costs as well as the costs which followed the event decided against him and in favour of the plaintiff. Was it within the discretion of the Lord Chief Justice to make such an order ? From the report it would appear that the learned Judge did not doubt his power to make the order, for he says that he refused the special order asked for by plaintiff as to his getting his costs over against his brother, and he then proceeds to give reasons for the refusal, which would have been quite unnecessary unless he were of opinion that he had jurisdiction to make the order. It is, however, only right to say that the point as to jurisdiction does not appear to have been raised at the trial,

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Was there, then, jurisdiction in the trial Judge, or is there jurisdiction in this Court to make the order now asked for by plaintiff ?

In my opinion there was and is such jurisdiction. The successful defendant's costs which the plaintiff was ordered to pay, were, it appears to me, " costs of " and incident to " the " proceeding " which plaintiff took against the two defendants for the recovery of damages for the injuries caused to him by one or other or both of them. Full effect has been given to the proviso in ordering that plaintiff should pay the successful defendant's costs of the action and should himself be paid his costs of the action by the unsuccessful defendant. But part of plaintiff's costs of and incident to the proceeding were the costs which he had been ordered to pay the successful defendant, and I find it impossible to conclude that the proviso (as to costs following the event where there has been a trial by jury) cuts down or limits the discretion of the Court so as to prevent an order being made in a proper case for the payment to the plaintiff of those costs by some party other than the party immediately concerned in the event in respect of which the costs were ordered to be paid.

There are cases in which a plaintiff might reasonably be in doubt as to who is the right person to sue, and in which it would be unsafe for him to refrain from suing a person against whom he had a possible remedy. By Order XVI, rule 4, he is entitled to join as defendants all persons against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, and by rule 7 of the same Order, where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may . . . join two or more defendants to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties.

If, then, by the conduct of one defendant, a plaintiff is induced, or if apart from such inducement it were reasonable in the circumstances for him, to join another defendant who in the result is freed from liability, it appears only just to relieve the plaintiff

from the payment of the successful defendant's costs if there be jurisdiction to grant such relief. He can only, in the absence of special cause shown and mentioned in the order where the case is tried by a jury, be relieved at the expense of the unsuccessful defendant, and I think that the provisions of Section 53 are wide enough to give the Judge or the Court power to grant such relief and make the order in a proper case.

In Mr. McGonigal's argument to the contrary, he relies upon the decisions of the Court of Appeal in England in *Sanderson v. Blyth Theatre Co.* (1), and *Bullock v. London Omnibus Co. & Others* (2), in each of which an order similar to that asked for in the present case was made by the Judge at the trial and upheld on appeal. These decisions were based to a large extent on the provisions of Section 5 of the Supreme Court of Judicature Act, 1890, which applies to England only, and provides that the costs of and incident to all proceedings in the Supreme Court shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid, and the argument is that it required this special Section to give the Judge or Court in England power to make such an order as plaintiff asks for, and that there is no such provision in our Judicature Act of 1877.

For the reasons already given, I think there is jurisdiction in the Court or Judge to make the order.

Mr. McGonigal also relied strongly upon and pressed us with the decision of the Irish Free State Supreme Court in *Little v. Dublin United Tramways Co.* (3), in favour of his argument that neither the trial Judge nor the Court has jurisdiction to make the order asked for. In that case it was held by Fitzgibbon and Murnaghan, JJ., Kennedy, C.J., dissenting, that the order of the trial Judge, by which he made the unsuccessful defendant liable for the costs of the successful defendant, was invalid as there was no issue at the trial as between the two defendants upon the result of which costs could depend ; and the costs dealt with in

(1) [1903] 2 K.B. 533.
(2) [1907] 1 K.B. 264.
(3) [1929] I.R. 642.

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the special order had already followed the event as between the plaintiff and the defendant O'Brien ; and further, there was no ground for holding that the costs of the issue between the plaintiff and the Tramways Company should include, as part of the plaintiff's costs, the costs ordered to be paid by the plaintiff to O'Brien. The result arrived at in this case is rather peculiar on the question of jurisdiction ; Kennedy, C.J., in his dissenting judgment, held in favour of jurisdiction. See particularly page 651 of the report. Fitzgibbon, J., held that in no circumstances could there be jurisdiction to make the order ; and Murnaghan, J., whilst holding that in the particular cases under discussion the orders were wrongly made, *appears* to have held the view that in a proper case such an order might be made, or, in other words, that there was jurisdiction to make it. See his first extreme illustration given at the bottom of page 672 of the report, and see also the concluding words of his judgment.

In these circumstances, if I am to make a choice, I prefer to adopt the conclusion of Kennedy, C.J., in favour of jurisdiction, though my mode of arriving at this result differs from his. It is not to be left out of account that by Section 61 of the Judicature Act, our rules were to be framed in such a way that, so far as practicable and convenient, having regard to the difference of the laws and circumstances of the two countries, the pleading, practice and procedure in our Courts should be the same as in England.

Assuming that the Lord Chief Justice had jurisdiction to make the order sought for by plaintiff, was this a case in which it ought to have been made ?

I have already expressed the opinion that the Order should only be made in a proper case by which is meant a case where the plaintiff has in the opinion of the Court or Judge acted reasonably in joining the successful defendant as a party to the action, and in which there is no ground for depriving that successful defendant of his costs, those costs having followed the event decided in his favour. What test of reasonableness should be applied ? I cannot suggest a better test than that laid down in the case of *Besterman*

v. British Motor Cab Co., Ltd. (1), as follows:—There is no rule to the effect that to justify an order on an unsuccessful defendant to pay a successful co-defendant's costs, the unsuccessful defendant must, before the issue of the writ, have given notice to the plaintiff that he is going to throw the blame on the other defendant; it is a question in all cases whether it was a reasonable and proper course for the plaintiff to join both the defendant in the action. Vaughan Williams, L.J., at page 186 of the report, asks: "Was "it a reasonable thing for the plaintiff in his action "against a man, who ultimately turns out to be in fact "the wrong-doer, to join the other defendant in order "that the matter might be thoroughly thrashed out? "If, in the circumstances of the case, it was a reason-"able thing to do, then he was entitled to add as part "of the costs in bringing this reasonable action in "which he reasonably joined this other person, the "costs of that other person who is found not to be at "fault." Again at the bottom of page 187 he says: "In this particular case we really have pretty ample "evidence from both defendants that it was reasonable "to join them both because each blamed the other. "I do not say that they gave notice of their blaming; "but in fact each, when the trial came off, tried to "put the blame on the other."

The reasonableness, then, of the plaintiff's course in joining both defendants being the test which I think ought to be applied, what should be done in this case? The successful defendant McConnell by letter of 6th September, 1932, through his solicitor, to plaintiff's solicitors, denies liability and says that the car in which plaintiff was riding (the defendant Mulligan's car) was entirely responsible for the damage; the defendant Mulligan pleads that if the plaintiff suffered damage, the same was caused *solely* by the negligence of the defendant McConnell, and at the trial each defendant tries to throw the blame on the other. In these circumstances it was in the result reasonable and proper to join both defendants in the action, and

(1) [1914] 3 K.B. 181.

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in my opinion the order which the plaintiff asked for at the trial should, in the exercise of proper judicial discretion, not have been refused, and should now be made by this Court.

Solicitors for the plaintiff: *Daniel O'Rorke & Son.*
Solicitors for the defendant, Francis Mulligan: *Carson & McDowell.*

J. McC.

PROVINCIAL BANK OF IRELAND LIMITED v. DONNELL (1).

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June 14. July 6.

Guarantee—"In consideration of advances heretofore made or that may hereafter be made"—Construction—Consideration—No intention of making further advances—No threat of legal proceedings.

The defendant's husband's account with plaintiff's branch Bank at L. was overdrawn and the plaintiffs had, as security for this overdraft, mortgages of two policies of insurance upon the life of the husband.

One policy with which the case was concerned was subject to a yearly premium of £24 12*s.* 0*d.*, payable in two equal moieties. The plaintiffs subsequently required the husband to obtain security for the payment of the premiums, and on the 7th November, 1924, the defendant signed a document not under seal which provided that in consideration of advances heretofore made or that might hereafter be made from time to time by the plaintiffs to her husband, she undertook to pay the premiums.

It was also provided that in the event of the Bank having to pay the premiums or any other sums necessary for keeping on foot the policy, the defendant should pay such sums on demand with interest at Irish Banks' current rate.

It was admitted on behalf of the plaintiffs that their anxiety was to secure the overdraft and that they had no intention of making any further advance to the plaintiff's husband.

The defendant was not at any time informed as to the state of her husband's account or that the plaintiffs would not make advances to her husband.

On 2nd January, 1931, the defendant at the request of the plaintiffs signed a second guarantee, which was simply a renewal, which the defendant was told would make no change in her obligations. The plaintiffs had not threatened to take proceedings against the defendant's husband when the first guarantee was signed, and they did not do so subsequently, and "there was no talk about an agreement not to sue."

The first default of the defendant's husband was in respect of the premium payable in December, 1931. This was paid by the defendant on 13th January, 1932. Further default occurred in respect of the June and December, 1932, premiums, and ultimately, these together with a sum for overdue charges were paid by the plaintiffs who sought to recover them by civil bill.

Held, by the Court of Appeal (Andrews and Best, L.JJ.), that there was no sufficient consideration to support the guarantee because, (*a*) as regards past advances the agreement could not be

(1) In the Court of Appeal before Andrews and Best, L.JJ.

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construed as a forbearance to sue ; and, (*b*) as regards future advances the agreement only amounted to an indication on the part of the plaintiffs that they might make further advances to the debtor, but there was no agreement binding them to do so, and as no advance had in fact been made, the undertaking of the defendant failed for want of consideration.

CASE STATED by Moore, L.C.J., as Judge of Assize, on an appeal from a decision of the Recorder of Londonderry.

The Case Stated was as follows :—

This case came before me at the Spring Assizes, 1933, for the County of Londonderry, as an Appeal from a decision of the Recorder of Londonderry dismissing on the merits a civil bill brought by the plaintiffs against the defendant for the recovery of £24 18*s.* 2*d.*

Of this sum £24 12*s.* 0*d.* was claimed as the amount of premiums due for the year 1932 on foot of a policy effected by the defendant's husband, William Edgar Marshall Donnell, on his own life with the Life Association of Scotland, and as payable by the defendant to the plaintiffs under a guarantee dated the 2nd January, 1931. The balance of the sum sued for, that is, 6*s.* 2*d.*, was claimed as overdue charges.

McGonigal, K.C., and Nicholson, appeared for the plaintiffs. Murphy, K.C., and MacDermott, were for the defendant.

For the plaintiffs Francis Rountree, the manager of the plaintiff's Londonderry branch from 1922 till 1928, and Albert H. Reid, the manager of the said branch from 1928 till 1932, were called as witnesses.

The defendant and her husband gave evidence for the defence.

The facts as admitted or found by me are as follows :—

Mr. Donnell, the defendant's husband, was a customer of the plaintiffs' branch Bank at Londonderry. For a considerable time prior to the 7th November, 1924, the date of the guarantee hereinafter mentioned, his account had been overdrawn and at that date the amount of his overdraft was, in round figures, £1,270. Apart from certain guarantees given by relatives of Mr. Donnell which are not material to this case the

plaintiffs had as security for this overdraft mortgages of two policies upon the life of Mr. Donnell. Of these policies one for the sum of £500 and profits payable on death was fully paid up. The other which was mortgaged to the plaintiffs as additional security for Mr. Donnell's overdraft on the 11th July, 1924, assured £700 on death, and was subject during life to a yearly premium of £24 12*s.* 0*d.*, payable in two moieties in June and December of each year. This is the policy referred to in the civil bill.

Some time after the £700 policy was mortgaged Mr. Rountree required Mr. Donnell to obtain a guarantee for the payment of the premiums. Mr. Rountree suggested that Mrs. Donnell, the defendant, should be the guarantor, and Mr. Donnell agreed to ask his wife to call at the plaintiffs' Londonderry Branch, which he did.

As a result of this the defendant visited said Branch and had an interview with Mr. Rountree during which she signed a form of guarantee in respect of the premiums on the £700 policy. This document is dated the 7th November, 1924. It is not under seal and is expressed to be made "in consideration of advances "heretofore made or that may hereafter be made "from time to time by the Provincial Bank of Ireland, "Ltd., to my husband, William Edgar Marshall "Donnell." I refer to said guarantee which is annexed to and is to be taken as incorporated with this case.

I find that the defendant when signing this document knew she was signing a guarantee in respect of the premiums on her husband's policy, and knew the nature and effect of the document. After the time the first guarantee was signed Mr. Donnell drew no more cheques on the account, but he paid interest on the overdraft until two or three years before these proceedings. His last cheque was drawn on 15th October, 1923, and thereafter his account was dormant. Mr. Rountree admitted that his directors' anxiety was to secure the overdraft and that they had no intention of making any further advances to Mr. Donnell. This was their attitude on the 7th November, 1924. It was their attitude during the remainder of

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Mr. Rountree's managership, during that of Mr. Reid and since.

Mr. Rountree explained the first guarantee to the defendant at the time she signed it, but did not read it to her. He did not at any time tell her of the state of her husband's account or inform her, as was the fact, that the directors would not make advances to her husband in the future.

On the 2nd January, 1931, during the managership of Mr. Reid, the defendant, at the request of the plaintiffs, signed a second guarantee. This document was in the same terms as the first guarantee. I beg to refer to this second guarantee which is annexed to and is to be taken as incorporated with this case. In the period between the first guarantee and the second the premiums on the £700 policy were paid by Mr. Donnell and no demand was made on the defendant. The second guarantee was prepared by the plaintiffs simply as a renewal. Mr. Reid who interviewed the defendant at the time she signed it told her it would make no change in her obligations. He explained the document to her and she read it. She understood the nature and effect of this document when she signed it.

I find that the defendant's knowledge of the second guarantee was the same as when she signed the first guarantee. She realised it was a guarantee for the premiums on her husband's policy.

As to the position with regard to Mr. Donnell's account at the date of the second guarantee, I refer to a copy of said account which is annexed to and is to be taken as incorporated with this case. The directors had no intention of making further advances to Mr. Donnell. Mr. Reid did not inform the defendant of this at the time she signed the second guarantee and there was no evidence showing or suggesting that the defendant was aware that this was the plaintiff's attitude.

The plaintiffs had not threatened to take proceedings against Mr. Donnell in respect of his indebtedness when the first guarantee was signed and they did not do so subsequently. Neither Mr. Rountree nor Mr. Reid

mentioned to the defendant the subject of proceedings against her husband. In this connection the substance of Mr. Donnell's evidence before me and as I find was the fact was that "there was no talk about any agreement "not to sue."

Mr. Donnell failed to pay the premium of £12 6*s.* 0*d.* due in December, 1931. By letter, dated the 5th January, 1932, Mr. Reid called upon the defendant to pay this sum and after some correspondence the defendant did so on the 13th January, 1932.

Mr. Donnell made default in paying the premiums due in June and December, 1932, amounting together to £24 12*s.* 0*d.* As appears from the correspondence hereinafter referred to, demand for these premiums was made upon the defendant. Subsequently the amount of these premiums was paid by the plaintiffs together with 6*s.* 2*d.* for overdue charges.

I refer to the several documents and letters set out in the Schedule hereto which are to be taken as incorporated with this case.

For the plaintiffs it was argued that the defendant was bound by her guarantee and that she was therefore liable to pay to the plaintiffs the sums paid by them as aforesaid.

For the defendant it was contended :—(*a*) that the evidence was admissible to show and did show that the consideration as set out in the guarantee sued upon was not truly stated : (*b*) that the only consideration was in respect of "advances heretofore made" and was therefore past and insufficient in law to support the guarantee ; and (*c*) that the plaintiffs should have informed the defendant before the guarantee was signed that notwithstanding the wording thereof they were not going to make future advances and that, as they had failed to do so, the guarantee was not binding upon the defendant.

I was informed that whatever my decision might be the unsuccessful party would desire a Case Stated and as I was of opinion that the facts raised an important question of law I agreed to state a Case.

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The question for the Court is whether upon the facts as found the defendant is in law liable to pay to the plaintiffs the sum sued for.

Dated this 2nd day of June, 1933.

McGonigal, K.C., and *Nicholson*, for the plaintiffs :—

The question to be decided is was there a good legal consideration for the guarantee. The fact that time was given to the husband is most material, on the authorities.

We contend that the words " in consideration of " advances already made " mean in consideration of the plaintiffs not suing the defendant's husband for advances already made. We also say that there was a forbearance *ex post facto*. The directors of the plaintiff company might have changed their minds on the question of giving further advances and have given such advances.

Crears v. Hunter (1), was a case where for the purpose of inducing the plaintiff to give time to the defendant's father for payment of a debt, the defendant signed a promissory note whereby the defendant's father and the defendant jointly and severally promised to pay to the plaintiff the amount of the debt with interest half-yearly at the rate of five per cent. per annum until the amount was paid. The plaintiff having forborne to sue for several years, it was held, that the plaintiff having forborne from suing the defendant's father at the defendant's request, there was a good consideration for the defendant's liability on the note although there was no contract by the plaintiff to forbear from suing. This case is important as showing that the Court is entitled to look at the surrounding circumstances and see what was in the minds of the parties. Contemporaneous circumstances can certainly be taken into account.

The words " in consideration of advances that may " hereafter be made from time to time " merely mean in consideration of keeping the account open.

(1) 19 Q.B.D. 341.

We rely on the words used by Parker, J., in *Wigan v. English and Scottish Law Life Assurance Association* (1), where he said that "if the security be communicated to a person who could otherwise sue on "the debt, and on the strength of that security he does "in fact forbear to sue on the debt, he does give that "time with the object of securing which the security "is presumably given, and then I think it appears on "the cases that there is sufficient consideration, "though in a sense it is an *ex post facto* consideration, "for the security which is given."

In *Glegg v. Bromley* (2), it was held that a husband's advances to his wife coupled with the fact that the husband took no proceedings to call in an existing debt from his wife to him, constituted good consideration for an assignment. We rely on the words used by Fletcher Moulton, L.J., in *Glegg v. Bromley* (2), at pp. 486-487. We rely on the words used by Bowen, L.J., in *Miles v. New Zealand Alford Estate Co.* (3), where he said: "It will be sufficient here that the "directors did forbear, if their forbearance was at the "request expressed or implied, of the guarantor and "in consequence of his guarantee being given, and it "seems to me there is no sort of necessity to discover "language of any particular form, or writing of any "particular character, embodying the resolution of "the directors."

The real object of the contract in the present case was the keeping open of the account. The fact that time has been given constitutes good consideration. The words of the guarantee "in consideration of "advances heretofore made by the Provincial Bank of "Ireland, Limited, to my husband" taken in conjunction with the surrounding circumstances, and having regard to the fact that for years past time had been given to the husband, mean "in consideration of "your not suing my husband for advances already "made to him."

When the second guarantee was signed the defendant knew that no further advances had been made after the signing of the first guarantee.

(1) [1909] 1 Ch. 291, 298.
(2) [1912] 3 K.B. 474.
(3) 32 Ch. D. 266, 291.

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In *The Alliance Bank, Limited v. Broom* (1), where a customer being called on by bankers to give security for money due from him on a loan account agreed by letter to give security, and a bill which had been filed to enforce such agreement was demurred to, on the ground that the agreement was without consideration. it was held that the forbearance of the bank to enforce payment of the existing debt, in consequence of the agreement, was a sufficient consideration to support it; and the demurrer was overruled.

In the present case, the defendant understood and signed the guarantee. The Court is entitled to infer that further advances were not in the defendant's mind when she signed the guarantee; she signed the guarantee in order to stave off proceedings.

If extra security is taken by the creditor the presumption is that this is an inducement to the creditor to hold his hand.

In *Wigan v. English and Scottish Law Life Assurance Association* (2), there was an express consideration on the face of the document, similarly in *Glegg v. Bromley* (3).

A forbearance to sue can be read into the document, and there being such a forbearance, there was valuable consideration for the guarantee.

The principle of law laid down in *Small v. Currie* (4), applies to the present case.

At the time that *Raikes v. Todd* (5) was decided, the Mercantile Law Amendment Act had not been passed, and it was then necessary that the consideration should be expressed in terms on the face of the document.

We submit that the plaintiffs are entitled to succeed.

[They also referred to *Fullerton v. Provincial Bank of Ireland* (6), and *Miles v. New Zealand Alford Estate Co.* (7).]

Murphy, K.C., and *MacDermott* for the defendant :—

There is no evidence that the defendant knew anything of the state of her husband's account. This

(1) 2 Dr. & Sm. 289.
(2) [1909] 1 Ch. 291.
(3) [1912] 3 K.B. 474.
(4) 2 Drew. 102, 114.
(5) 8 Ad. & E. 846.
(6) [1903] A.C. 309.
(7) 32 Ch.D. 266.

document coming from the plaintiffs, if ambiguous, is to be construed against the plaintiffs. This is not a case as between debtor and creditor. The dicta relied on, on behalf of the plaintiff, in *Glegg v. Bromley* (1), are based on the facts of that particular case.

In *Fullerton v. Provincial Bank of Ireland* (2), Lord Macnaghten said in his speech in the House of Lords, "It is quite enough if you can infer from the sur- "rounding circumstances that there was an implied "request for forbearance for a time, and that for- "bearance for a reasonable time was in fact extended "to the person who asked for it," but in the present case there is no evidence from which such forbearance could be presumed. We submit that all the facts negative any such forbearance. This was a case of the Bank standing on its security and wanting to make its security as strong as possible. The plaintiffs' anxiety was to secure themselves.

There is no evidence that anything was ever said to the defendant about forbearance. There was an anxiety on the part of the Bank to entrench their secured position. There is not even a suggestion in the evidence of forbearance. The attitude of the Bank was not that of a creditor holding off, they were relying on their security.

The cases relied on, on behalf of the plaintiffs all depend on an implied request. The only exception to this is *Crears v. Hunter* (3). In that case there was evidence of the intention of the parties.

The contract in the present case was one of suretyship. This is a contract which is recognised as being delicately poised, and there are cases of suretyship where the contract may be set aside.

The plaintiffs should have told the defendant that this was a stagnant account. They were presenting the document in the form most likely to secure the defendant's signature.

Information which was not given to the defendant should have been given. The plaintiffs cannot succeed unless there was an implied request to forbear, and there is no evidence of anything of the kind.

(1) [1912] 3 K.B. 474.
(2) [1903] A.C. 309, 313.
(3) 19 Q.B.D. 341.

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[They also referred to *Davies v. London and Provincial Marine Insurance Company* (1).]

McGonigal, K.C. (in reply):—

Any forbearance that can be attributed to the guarantee is sufficient. The defendant went security for her husband in order that he might gain time. It is not necessary to prove that pressure had been brought to bear upon the defendant's husband.

Cur adv. vult.

ANDREWS, L.J.

July 6.

ANDREWS, L.J.: This is a Case Stated by the Lord Chief Justice on the hearing of a civil bill appeal at the last Assizes for the County of Londonderry. The plaintiffs' claim was for £24 18*s.* 2*d.*, premiums and overdue charges paid by the plaintiffs on foot of a policy on the life of one William E. M. Donnell, which sum it was alleged is payable to the plaintiffs by the defendant on demand under agreement made between the plaintiffs and the defendant, on 2nd January, 1931.

It appears that the defendant's husband, William E. M. Donnell, was a customer of the Bank. For a considerable time prior to 7th November, 1924, his account had been overdrawn, and at that date the amount of his overdraft was about £1,270. Amongst other securities the plaintiffs had, as security for this overdraft, mortgages of two policies on the life of Mr. Donnell, one of which for £700 was subject during the life of Mr. Donnell to the yearly premium of £24 12*s.* 0*d.* This policy was mortgaged on 11th July, 1924, and on 7th November, 1924, the defendant's guarantee for payment of the premiums was obtained—a document not under seal, which was expressed to be made "in "consideration of advances heretofore made or that "may hereafter be made from time to time" by the Bank to the defendant's husband. It is found in the case that the defendant when signing this document knew she was signing a guarantee in respect of the premiums on her husband's policy, and that she knew the nature and effect of the document. The last cheque

(1) 8 Ch. D. 469.

which the defendant's husband drew on the account is dated 15th October, 1923—more than a year prior to the guarantee—and from that date the account became dormant. It was admitted that the anxiety of the plaintiffs' directors was to secure the overdraft, and that they had no intention then or at any time thereafter, of making any further advances to Mr. Donnell. The defendant was not at any time informed as to the state of her husband's account, or that the directors would not make advances to her husband in the future. On 2nd January, 1931, the defendant, at the request of the plaintiffs, signed a second guarantee in the same terms as the first. It was simply a renewal which the defendant was told would make no change in her obligations, and it is held by the Lord Chief Justice that she also understood the nature and effect of this document when she signed it. All premiums during the currency of the first guarantee had been paid by the defendant's husband.

It is further found in the case that the plaintiffs had not threatened to take proceedings against the defendant's husband when the first guarantee was signed, and they did not do so subsequently, and "there was no talk about any agreement not to sue."

The first default of the defendant's husband was in respect of the premium of £12 6*s*. 0*d*., which fell due in December, 1931. After some correspondence this was paid by the defendant on 13th January, 1932. Further default occurred in respect of the June and December premiums; and, ultimately, these together with 6*s*. 2*d*. for overdue charges were paid by the plaintiffs. It is in respect of these payments that the present proceedings were instituted.

The only defence foreshadowed in the correspondence was that the defendant had no independent advice when she signed the guarantee, and that she did not fully understand the effect of signing it. The findings in the case stated made this contention unarguable.

In these circumstances the real defence urged before us by counsel for the defendant was that as the guarantee was not under seal it must, like other simple contracts, be supported by a valuable consideration,

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The mere existence of a debt is not sufficient to support the surety's promise to the creditor. A past or executed consideration, unless moved at the defendant's request, is not binding without some new consideration. It is true that an agreement by a creditor that he will forbear to sue the principal debtor for a past debt is a sufficient consideration for a person becoming a surety for the debt. So also is actual forbearance at the request, express or implied, of the defendant. But it is only by such agreement for forbearance or by actual forbearance to sue that a past consideration may be relied upon as a valuable consideration which will support the guarantee. It was to bring the present case within this principle that plaintiffs' counsel argued that the true meaning of the opening words of the guarantee sued upon is " in consideration of your not " suing my husband for advances already made to him." The first difficulty, however, in upholding this construction is that, although such forbearance might have been easily expressed, this has not been done ; and I am unable to put a forced and unnatural construction upon words which are in no way ambiguous merely to make the guarantee binding and enforceable by action. One ought to be slow in implying consideration in favour of the Bank, whose document this guarantee is, especially when one remembers that when the guarantee was signed they did not stand to the defendant in the relationship of creditor and debtor.

The construction contended for becomes all the more difficult when it is remembered that as the Lord Chief Justice finds " there was no talk about any " agreement not to sue ; " and, finally, the grammatical difficulties which arise from the reference to the past advances being immediately followed in the same sentence by a reference to the future advances compel me to reject the plaintiffs' contention without any hesitation. I leave the argument in reference to the consideration afforded by past advances by merely saying that if, apart from agreement, there was in fact a forbearance to sue there is not a particle of evidence to show, as is necessary, that such forbearance resulted from any request, express or implied, on the part of the defendant,

It only remains to consider whether the consideration is made valuable by the reference to "advances that "may hereafter be made from time to time by the "Bank." It is clear that an agreement by the plaintiff for a future advance to a third person is a sufficient consideration for the defendant's promise to be answerable for the payment to the plaintiff of past and future debts of such third person. It is, however, in my opinion, equally clear that where, as in the present case, there is no agreement binding on the plaintiffs to make the advances, and no advances are in fact made, the guarantee fails for want of consideration.

In *Westhead and Others v. Sproson & Piper* (1), the defendants gave to the plaintiffs a guarantee in respect of present and future indebtedness "in consideration "of your agreeing, at our request from time to time, "to supply on credit to P. such goods as he may "require and you may think fit to supply." It was held by Pollock, C.B., and by Martin, Bramwell and Wilde, B.B., that, as the guarantee did not contain any binding agreement on the part of the plaintiffs to supply goods to P., and as they never did in fact supply any goods to P. after the date of the guarantee, the defendants did not become liable to pay the existing debt of P. The principle of the decision is to be found in the judgment of Pollock, C.B., that, as the plaintiffs had entered into no binding agreement to supply goods to P., the guarantee must be construed as conditional, so that, in the event of the plaintiffs thinking fit to supply and supplying goods to P., there would be a performance of the condition, and the defendants would be bound, but not otherwise. The supply of the goods was to depend entirely on the will of the plaintiffs, and there was, therefore, no consideration for the agreement. In *Boyd v. Moyle* (2), there was no binding obligation to sell goods or make advances, but such sales and advances took place. Whilst in these circumstances the verdict was for the plaintiff, Tindall, C.J., in his judgment, said:—"The whole "depends upon the future sale and delivery of goods

(1) 6 H. & N. 728. (2) 2 C.B. 644.

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"and advance of money: and so far it is unexceptionable; for the contract could not be enforced unless "there had been a sale of goods, or an advance of "money, to some amount."

The authority of these cases has never been questioned, and *Westhead's* case (1) was expressly followed in *Morrell v. Cowan* (2). The wife of a retail trader, in order to obtain credit for her husband from a wholesale merchant, gave the latter a written guarantee as follows:—"In consideration of you, M., "having at my request agreed to supply and furnish "goods to C. (the husband) I do hereby guarantee to "you, M., the sum of £500." In his judgment (at page 171) Fry, J., says:—"The next question is "whether any sufficient consideration was given to "the wife for the guarantee. I am of opinion that the "agreement by the plaintiff to supply goods to the "husband would not of itself, independently of its "performance, furnish a good consideration, for it is "so indefinite an agreement that it falls within the "principle of the decision in *Westhead v. Sproson* (1), "where it was held that, as the guarantee which was "sued upon did not contain any binding agreement "by the plaintiffs to supply goods to P., and they "never did supply any goods to P. after the date of "the guarantee, the defendants did not become liable "on the guarantee. But it appears to me that the "guarantee in the present case embodies a request "by the wife to the plaintiff to supply goods to her "husband, and that, if that request was acceded to, "a good consideration at once arose to the wife for the "guarantee."

These cases rule the present, in which, not only were no advances made by the plaintiffs to the defendant's husband after the guarantee (for unpaid interest added to the plaintiffs' claim is clearly not such "an advance"), but it is admitted and found in the case that the plaintiffs' directors had no intention of making any further advances. In my opinion we must answer the question submitted to us—that on the facts found

(1) 6 H. & N. 728. (2) 6 Ch.D. 166.

the defendant is not liable to pay to the plaintiffs the sum sued for. The defendant is entitled to her costs of the case stated which we measure at £15 15*s.* 0*d.*

BEST, L.J.: In this case the plaintiffs sued the defendant at the Recorder's Court in Londonderry for £24 18*s.* 2*d.*, being premiums (£24 12*s.* 0*d.*) and over-due charges (6*s.* 2*d.*) paid by the plaintiffs on foot of a policy of insurance on the life of William Edgar Marshall Donnell, defendant's husband, alleged to be payable to the Bank on demand by the defendant under an agreement made between the plaintiffs and defendant, dated the 2nd day of January, 1931. The defendant's husband was a customer of the plaintiffs' branch Bank at Londonderry, and for a considerable time prior to the 7th of November, 1924, his account had been overdrawn and at that date the amount of the overdraft was in round figures £1,270. The plaintiffs had as security for this overdraft, *inter alia*, mortgages of two policies of insurance upon the life of Mr. Donnell. One of these was fully paid up and the other, which was mortgaged on July 11th, 1924, and with which this case is concerned, assured £700 on death and was subject during life to a yearly premium of £24 12s. 0*d.*, payable in two moieties, in June and December of each year. Sometime after this policy had been mortgaged to plaintiffs they required Mr. Donnell to obtain security for the payment of the premiums on foot thereof, and on the 7th of November, 1924, defendant signed a document which was not under seal and which, so far as material for the purposes of this case was in the following terms:—"In consideration of advances heretofore "made or that may hereafter be made from time "to time by the Provincial Bank of Ireland, Limited, "to my husband, William Edgar Marshall Donnell, I "hereby undertake, consent and promise with the said "Bank that I will from time to time pay the annual "premium of £24 12*s.* 0*d.* payable by half-yearly "instalments on the 1st days of June and December "in each year and any other sums for the time being "necessary for keeping on foot" the said policy, and

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there was a covenant to deliver the receipt for the premium to the Manager of the Bank at Londonderry, and in the event of the Bank having to pay the said premium or premiums or any other sums necessary for keeping on foot the said policy, defendant agreed to pay said sums on demand with interest thereon at Irish Banks' current rate.

It is found in the case stated that defendant when signing this document knew she was signing a guarantee in respect of the payment of the premiums on her husband's policy and knew the nature and effect of the document. The last cheque which defendant's husband drew on plaintiffs' Bank was dated 15th October, 1923, and thereafter the account was dormant, but he paid interest on his overdraft until two or three years before the present proceedings were taken.

Mr. Rountree, who had been Manager for the plaintiffs at their branch Bank in Londonderry, in November, 1924, admitted on the hearing of the civil bill appeal that his directors' anxiety was to secure the overdraft and that they had no intention of making any further advances to Mr. Donnell. This was their attitude from November, 1924, down to the date of the taking of proceedings.

Mr. Rountree explained the nature of the document of 7th November, 1924, to defendant but did not read it to her, nor did he at any time tell her of the state of her husband's account or inform her that the directors would not make advances to her husband in the future.

On January 2nd, 1931, during the managership of Mr. Reid, defendant, at the request of the plaintiffs, signed a second document which was identical in terms except as to date and witnessing party with that signed on 7th November, 1924. Between the dates of the two documents all premiums on foot of the policy had been paid by defendant's husband and no demand for payment thereof had been made upon the defendant. The second document was prepared by plaintiffs as a renewal of the first, it was explained to the defendant by Mr. Reid, who said it would make no change in her obligations and defendant herself read it and is found

by the Lord Chief Justice to have understood its nature and effect.

Plaintiffs had not threatened to take proceedings against defendant's husband in respect of his indebtedness prior to the signing of the document of 7th November, 1924, or at all, and neither Mr. Rountree nor Mr. Reid mentioned to the defendant or discussed with her the subject of the taking of proceedings against her husband nor was there any talk about an agreement not to sue. Defendant's husband failed to pay the premium of £12 6*s.* 0*d.* payable in December, 1931. By letter, dated 5th January, 1932, Mr. Reid called upon the defendant to pay this sum and after some correspondence the defendant did so on the 13th of January, 1932.

Mr. Donnell made default in paying the premiums due in June and December, 1932, amounting together to £24 12*s.* 0*d.* Demand in writing for the payment of these premiums was made upon the defendant who refused to pay. Subsequently the amount of the premiums with 6*s.* 2*d.* for overdue charges was paid by the plaintiffs, and these are the sums sued for.

Defendant in the document which she executed on January 2nd, 1931, undertook, consented and promised with the plaintiffs that she would from time to time pay the annual premium due on foot of the said policy, and in the event of the Bank having to pay the said premium or any other sums for keeping on foot the policy, she agreed to pay to the Bank on demand all such sums with interest thereon.

Was there any consideration for this undertaking given and promise made by the defendant to the plaintiffs ? Mr. McGonigal says there was such consideration and in proof thereof he relies upon the opening words of the guarantee, *viz.* : " In consideration " of advances heretofore made . . . by the " Provincial Bank of Ireland Limited to my husband." He says that these words taken in conjunction with the surrounding circumstances, and having regard to the fact that for years past time had been given to the husband, mean " In consideration of your not suing " my husband for the advances already made to him."

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If this were the meaning of the words there would be a clear forbearance to sue—and a good consideration for the promise made by the defendant; but I do not think the words can bear this meaning. In the first place if this had been the meaning intended to be conveyed it would have been quite easy to say so. In the second place the forbearance to sue must, on this construction of the opening words, apply also to future advances as no distinction is made between the advances heretofore made and those hereafter to be made from time to time, and it is absurd to suppose that the words used could bar or were intended to bar the Bank for all time from suing defendant's husband for the monies due by him. In the third place such a construction is absolutely inconsistent with the evidence given on behalf of the plaintiffs and with the facts found in the case for it is clearly found that there was no suggestion made to the defendant that proceedings were about to be, or might be, taken against her husband and the subject was not at any time discussed or even mentioned.

The opening words cannot therefore, in my opinion, bear the construction contended for by the plaintiffs.

The consideration then, if any, for the defendant's promise and undertaking must be found in respect of the advances "that may hereafter be made from time "to time" by the plaintiffs. The document was not signed by or on behalf of the plaintiffs, but even if it had been so signed, it did not bind them to make any future advances to the defendant's husband, and without having resort to the evidence given by Mr. Rountree and Mr. Reid who made it clear that their directors had determined not to make further advances, I am clearly of opinion that the plaintiffs were under no obligation to make such advances in future, and unless and until these advances were actually made by them there was no consideration to support the promise made or undertaking given by the defendant. It is admitted that advances of fresh monies had ceased for a considerable time prior to the signing of the first document on 7th November, 1924, and Mr. McGonigal is driven to argue that advances were made by the

debiting from time to time of the interest payable on the debtor's overdraft, but I refuse to hold that such a construction is justifiable. The document can, in my opinion, only be construed as an indication on the part of the plaintiffs that they might make further advances to the debtor, but there was no agreement binding them to do so and if, as is the case here, no advance was in fact made, the undertaking of the defendant fails for want of consideration ; see *Westhead v. Sproson* (1), and *Lysaght v. Walker* (2).

The result is that there should be judgment for the defendant as she is not liable to pay to the plaintiffs the sum sued for there being no consideration for her promise or undertaking to pay such sum.

Solicitors for the plaintiffs : *H. C. O'Doherty & Son.*
Solicitors for the defendant : *Caldwell & Robinson.*

J. McC.

(1) 6 H. & N. 728.
(2) 5 Bligh N. S. 1 ; 2 Dow & Clark, 211.

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June 15
July 5.

Local Government—Pensionable office—Decision of Civil Service Committee—Whether reviewable by Court—Sanction—Whether may be given retrospectively—Local Government (Ireland) Act, 1919 (9 & 10 *Geo.* 5, *c.* 19) *s.* 8 (1)—*Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67) *s.* 68 (2).

The plaintiff was employed by the defendants as caretaker of a public park. On 1st March, 1930, the plaintiff resigned and the defendants granted him a pension of £12 per annum under the Local Officers' Superannuation (Ireland) Act, 1869, from 1st April, 1930. On 17th June, 1932, an application by the plaintiff for a life pension of £41 6*s.* 10*d.* per annum was granted by the Civil Service Committee in pursuance of powers vested in them by section 8 of the Local Government (Ireland) Act, 1919, as amended by section 68 of the Government of Ireland Act, 1920, payable by the defendants from 1st April, 1930.

Held (1) That the decision of the Civil Service Committee was reviewable by the Court.

(2) That the plaintiff held a "pensionable office" within the meaning of section 8 sub-section 1 of the Local Government (Ireland) Act, 1919.

(3) That the sanction required to be given by the said section 8 sub-section 1 could be given retrospectively.

ACTION for a declaration that the plaintiff is entitled, under an Award dated 17th June, 1932, made by the Civil Service Committee of Northern Ireland pursuant to powers vested in them by section 8 sub-section 1 of the Local Government (Ireland) Act, 1919, as amended by section 68 sub-section 2 of the Government of Ireland Act, 1920, to a life pension of £41 6*s.* 10*d.* per annum from 1st April, 1930.

On 22nd April, 1908, the plaintiff was appointed caretaker of the Anderson Park, Coleraine, by the defendants. He was appointed at a weekly wage payable monthly with a free house. On 1st March, 1930, the plaintiff tendered his resignation, which was accepted, and he was granted a pension of £12 per annum as from the 1st April, 1930, under section 1 of the Local Officers' Superannuation (Ireland) Act,

(1) In the Chancery Division before Megaw, J.

1869. In November, 1930, the plaintiff's attention was called to the provisions of section 8 of the Local Government (Ireland) Act, 1919, and he thereupon applied for a pension, under its provisions, to the Civil Service Committee of Northern Ireland. On 19th June, 1931, the Civil Service Committee formally sanctioned the resignation of the plaintiff, and on 17th June, 1932, the Civil Service Committee awarded the plaintiff a life pension of £41 6*s.* 10*d.* per annum payable by the defendants from 1st April, 1930, under the provisions of section 8 of the Local Government (Ireland) Act, 1919, as amended by the Government of Ireland Act, 1920.

Nicholson for the plaintiff :—

The plaintiff was an "officer" within the meaning of section 8 sub-section 1 of the Local Government (Ireland) Act, 1919. That Act is to be read with the Local Government Act, 1898, and the expression "officer" is defined by section 109 of that Act as inclusive of "any office, situation or employment." "Pensionable office" is defined by the said section 109 as meaning an office coming within the provisions of any Act authorising the grant of a superannuation allowance.

That the plaintiff's office was an office within the provisions of the Local Officers' Superannuation (Ireland) Act, 1869, was recognised by the defendants when they granted him a pension under that Act and they are now estopped from denying that he comes within the provisions of that Act.

The resignation of the plaintiff was sanctioned by the Civil Service Committee. "Sanction" in its natural meaning applies to "ratification" as well as "authority" and "approval." [Stroud's Judicial Dictionary, Second Edition, page 1790.] "Sanction" has been construed as "approval" by Lindley, L.J., in *In re National Bank of Wales* (1). Approval may be given before or after an act has been exercised. Where "sanction" is to be restricted to mean "prior

(1) 66 L.J. (Ch.) 223, 227.

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"sanction," the enactment which makes such sanction necessary expressly limits its meaning. [He referred to the judgment of Vaughan Williams, J., in *In re London Metallurgical Company* (1).]

The award of the Civil Service Committee, who have now the powers given originally to the Local Government Board, is binding and conclusive and cannot be reviewed by the Court. In the case of any dispute, by section 8 of the Local Government (Ireland) Act, 1919, "the right to and amount of any allowance . . . "shall be determined by the Local Government "Board." The determination of "right to pension" includes the question of whether the plaintiff satisfied the conditions of section 8.

I rely on the judgment of Murnaghan, J., in *Rex (Dillon) v. Minister of Local Government and Public Health* (2), and upon the decision of the Privy Council in that case refusing leave to appeal.

E. S. Murphy, K.C., and *Chambers* for the defendants:—

A caretaker employed at a weekly wage is not a "pensionable officer" within the meaning of section 8 sub-section 1 of the Local Government (Ireland) Act, 1919.

The plaintiff applied for and was granted a pension of £12 per annum under the Local Officers' Superannuation (Ireland) Act, 1869, and is estopped from applying for or obtaining any further pension.

In *Rex (Dillon) v. Minister for Local Government and Public Health* (2), Murnaghan, J., held that the decision of the Minister for Local Government under section 8 of the Local Government (Ireland) Act, 1919, was not reviewable by the Court but Kennedy, C.J., and Fitzgibbon, J., expressed no opinion on that question. The decision of the Privy Council refusing liberty to appeal certainly did not affirm the principle which Murnaghan, J., adopted as the basis of his decision.

On the facts the plaintiff clearly did not resign with the sanction of the Civil Service Committee. Decisions

(1) [1897] 2 Ch.D. 262, 269, 270.

(2) [1927] I.R. 474, 485, 492.

which give retrospective operation to other words in other statutes are no authority on the words in section 8 of the Local Government (Ireland) Act, 1919.

Cur. adv. vult.

MEGAW, J.: This action is brought by Knox Miller, formerly caretaker of the Anderson Park, Coleraine, against the Borough of Coleraine claiming that he is entitled under an award, dated 17th June, 1932, made by the Civil Service Committee of Northern Ireland pursuant to powers vested in them by the Statutes 9 & 10 Geo. V., c. 19, sec. 8 (1), as amended by 10 & 11 Geo. V., c. 67, sec. 68 (2), to a life pension of £41 6*s.* 10*d.* per annum from 1st April, 1930, and for ancillary relief. The defendants dispute the validity of the award on the ground that it is *ultra vires* and of no effect, and they also plead an estoppel.

The facts which give rise to the action are as follows:—

The plaintiff was on 22nd April, 1908, appointed caretaker of the Anderson Park, Coleraine, by the Coleraine Urban District Council, by which name the defendants were then known. He was appointed at a weekly wage of 15*s.* 0*d.*, payable monthly, with a free house, and his wages were, during the course of his employment, raised from time to time so that at the time of his cessation of service he was in receipt of £2 5*s.* 0*d.* a week between wages and allowance. Though for some reason or other this remuneration has been referred to as salary and has been worked out on an annual basis, the facts are that the plaintiff remained throughout his employment on a weekly wage.

On 1st March, 1930, the plaintiff, being over 70 years of age, wrote to the Mayor of Coleraine in the following terms:—

"Sir,

"I beg to tender my resignation as caretaker of the "Public Park, from 1st March, 1930. I feel old-age "approaching and cannot perform the work as I "would like to do."

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This was followed by a letter dated 5th April, 1930, in which he asked that the Council should give him a small pension.

On 8th May, 1930, the Town Clerk communicated with the Ministry of Home Affairs mentioning the application and asking whether the Minister would regard Miller as an officer and would be prepared to approve of a pension in the event of the Council deciding to grant one.

The result of this was that a pension of £12 a year was awarded to the plaintiff with the sanction of the Governor of Northern Ireland, and this has been paid by the defendants since that date.

This pension was granted on the assumption that the plaintiff was an officer within the meaning of section 1 of the Local Officers' Superannuation Act, 1869, and would only be valid on that basis.

In November, 1930, the plaintiff's attention was called to the provisions of the Local Government (Ireland) Act, 1919, section 8, and he thereupon put in a claim for a pension under its provisions to the Civil Service Committee of Northern Ireland. They entertained the claim and communicated with the defendants, and their then Town Clerk replied by letter of 7th January.

It is to be observed that at the date of his retirement the plaintiff made no application to any one other than the defendants for sanction of his resignation, pointing out that a pension had already been sanctioned and also calling attention to the fact that Miller and his wife were in receipt of old age pensions. The Civil Service Committee, however, on 21st March, 1931, by letter informed the defendants that they had provisionally decided to sanction his retirement, and on 9th June, 1931, they wrote to the plaintiff that they were prepared to sanction his resignation subject to a condition which the plaintiff complied with, and on 19th June the sanction of the Civil Service Committee to a resignation which had been effected more than a year before was formally communicated to plaintiff. After some further correspondence between the Civil Service Committee and the Clerk of the defendants—

which consisted of inquiries on the one side and objections and remonstrances on the other—the Civil Service Committee on 17th June, 1932, made the award that is now impeached.

The respective positions of the defendants and the Civil Service Committee in reference to the matter are summed up in their respective letters of 14th April, 1932, and 17th June, 1932.

In the letter of 14th April, 1932, the clerk of the defendants opposed the making of an award on several grounds, viz.: (1) That Miller resigned without the sanction of the Civil Service Committee. (2) That his resignation was accepted and his pension legally fixed by the Council under the Local Officers' Superannuation (Ireland) Act, 1869, and sanctioned by the Governor of Northern Ireland. (3) That the Council must adhere to the arrangement then made. (4) That if such a pension as was proposed should be awarded that the amount should be abated by the amount of Miller's old age pension as the Council had been contributors to the old age pension scheme.

In their letter of 17th June, 1932, the Civil Service Committee asserted that they had power to sanction a resignation *ex post facto*, that Miller's was a proper case in which they might exercise their discretion, that it was clear that Miller was a pensionable officer within the provisions of section 8 of the Local Government (Ireland) Act, 1919, and that had he applied to the Committee before his resignation "sanction would "have been granted and pension would have followed "as a matter of routine." They further pointed out that at the time of his retirement Miller was ignorant of the provisions of section 8 and that they did not now feel that in the circumstances he should be deprived of the benefits of the section. Miller also had consented to forego the pension awarded under the Act of 1869 and that payments made under that Act should be deducted from the award, but that it was impracticable to abate the award by the amount of Miller's old age pension.

The basis of the plaintiff's claim is section 8 (1) of the Local Government (Ireland) Act, 1919: "If any

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"officer of a local authority who holds on the passing "of this Act a pensionable office is removed from . . . "or resigns his office with the sanction of the Local "Government Board, he shall without prejudice to "any other right be entitled to receive from the local "authority an allowance . . . and the right to "and amount of any such allowance shall in case of "dispute be determined by the Local Government "Board."

By section 68, sub-section 2, of the Government of Ireland Act, 1920, the functions given to the Local Government Board by section 8 of the Local Government (Ireland) Act, 1919, were transferred to the Civil Service Committee of Northern Ireland.

The question raised by the defence is that the award of the Civil Service Committee of 2nd June, 1932, was in the circumstances *ultra vires* and invalid.

In the forefront of his case plaintiff's counsel put forward the strong proposition that the award, having purported to be made under the statutes mentioned in the claim, was absolutely binding and was one of which the validity could not be investigated by the ordinary Courts of Law, and that the Civil Service Committee was the ultimate tribunal to deal with such matters, and I must consequently deal with this contention at the outset.

Whatever may be the powers of the Civil Service Committee for Northern Ireland in regard to other matters, its powers as regards the pensions of Local Government officers are no greater than those previously held by the Local Government Board and transferred to this Committee. These powers are undoubtedly very wide and far-reaching, but do they extend to the absolute finality contended for? Was the jurisdiction given by the Act of 1919, section 8, to be determined by the Local Government Board itself, and now by the Civil Service Committee, and was their decision as to that not reviewable by the Courts whether by way of *certiorari* or otherwise? If Ronan, L.J.'s judgment in *Rex* (*Corporation of Limerick*) *v. Comerton, and Local Government Board* (1), is to be accepted, it would

(1) [1922] 2 I.R. 76.

almost seem as if this were the case, but I think that this is in direct conflict with the words of the Chief Baron in *Reg.* (*Wexford County Council*) *v. Local Government Board* (1), to which he refers, viz., "The "law is settled that where a jurisdiction is given "to a tribunal in certain events, the jurisdiction "only arises on the actual happening of the events. "If they have not happened in fact they cannot obtain "jurisdiction by wrongly deciding that they have "happened." Ronan, L.J.'s judgment seems to me to amount to a decision that the Local Government Board, if they come to a wrong decision in law on a preliminary point, can give themselves a jurisdiction which they would not have possessed if they had made a proper decision.

The judgments in *Reg.* (*Wexford County Council*) *v. Local Government Board* (1) are of the greatest importance. Palles, C.B., reviews all the law, and his logic, reasoning, and clarity of statement as to the constitutional position of subordinate tribunals and delegated powers given by the Legislature are to my mind very cogent and convincing. He unhesitatingly held that the Local Government Board was not exempt from the writ of *certiorari*. Then he dealt with the position whether the orders impeached were made under judicial or ministerial powers—and comes to the conclusion that in that case they were judicial—and after so deciding he says at p. 373: "I have always "thought that to erect a tribunal into a 'Court' or "'jurisdiction' so as to make its determinations "judicial, the essential element is that it should have "power by its *determination* within its jurisdiction to "impose liability or affect rights."

At p. 374: "A judicial act by an inferior Court does "not always bind even the parties to it. To do so it "must be within its jurisdiction, and therefore if the "determination be as to the limits of its jurisdiction "and be erroneous so that the act is in excess of juris-"diction, it will not bind."

In the end in that case the Court of Appeal—a very strong Court, Palles, C.B., Fitzgibbon, L.J., and

(1) [1902] 2 I.R. 349.

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Holmes, L.J.—granted the writ of *certiorari* because the actual decision was based on a wrong principle.

Whether the classification of delegated powers into judicial, on the one hand and administrative or ministerial on the other is mutually exclusive, or whether it is even complete I very much doubt. Clear and definite dichotomies do not often occur in law. We hear often of " border line cases " but I think there is often a no man's land of greater or less extent fringing that imaginary line. A case that has weighed much with me in coming to a decision on this point is one where delegated legislative functions were given, and in my opinion the judgments in the House of Lords in the case I refer to illustrate principles that are applicable generally, and seem to establish that everything depends on whether a legislative Act giving powers has in fact given to the delegated body the functions it purports to exercise. They support also the principle that the interpretation of the power-enacting clauses of legislative Acts is the function of the King's Courts. Of course, in the exercise of their judicial capacity the Courts may come to the conclusion at the outset that their jurisdiction as to everything connected with the delegated powers has been taken away, but they are the judges who have got to decide whether they are precluded from a further investigation of the Statute and to what extent. This is inherent in the constitutional position of the King's Courts. The case I refer to is *The Minister of Health v. The King (on prosecution of Yaffe)*, (1). It was a case of Certiorari. Though the writ of certiorari directed to be issued by the Court of Appeal was ordered to be discharged, there are some principles approved of which are, I think, applicable to the case under review. That case arose in regard to the confirmation of a Scheme by the Minister of Health which was made under the provision of the Housing Acts. One of the defences of the Minister was that by virtue of section 40, sub-section 5, of the Act, the Scheme, such as it was, when confirmed by the Minister, had the position of an Act of Parliament and its validity could not be inquired into by

(1) [1931] A.C. 494.

the Courts of law in certiorari proceedings. The sub-section in question enacted that the order of the Minister when made should have effect as if enacted by the Act. By the Divisional Court this defence was upheld by a majority, but so far as the order being open to review on certiorari, the Court of Appeal reversed this judgment, and, after considering the scheme, held that it was bad and not in conformity with the Act.

The case then came before the House of Lords when the question of the rights of the Courts to review administrative legislation was debated.

Dealing with the point regarding the finality of the order under the sub-section in question, Lord Dunedin says at p. 501: "The first question and it is a very "important and far-reaching one, is therefore as to the "effect of section 40 (5). Has it the effect of pre- "venting any inquiry by way of certiorari proceeding "of a scheme confirmed by the Minister? It is evident "that it is inconceivable that the protection should "extend without limit. If the Minister went out of "his province altogether, if, for example he proposed "to confirm a scheme which said that all the proprietors "in a scheduled area should make a *per capita* con- "tribution of £5 to the municipal authority to be applied "by them for the building of a hall, it is repugnant "to common sense that the order would be protected, "although if there were an Act of Parliament to that "effect, it could not be touched."

After referring to the case of the *Institute of Patent Agents v. Lockwood* (1)—which he referred to as "the high "water mark of inviolability of a confirmed order" and distinguishing it he went on to say at page 503, that if a scheme is made under an Act of Parliament and the scheme as made conflicts with the Act from which it derives its force it will have to give way to the Act. "The mere confirmation will not save it. It "would be otherwise if the scheme had been, *per se*, "embodied in a subsequent Act, for then the maxim "to be applied would have been *Posteriora derogant* "*prioribus*. But as it is, if one can find that the "scheme is inconsistent with the provisions of the

(1) [1894] A.C. 347.

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"Act which authorises the scheme, the scheme will be "bad, and that only can be gone into by way of pro- "ceedings in certiorari."

Lord Warrington at p. 514: "The order of the "Minister purported to be made under section 40 of the "Housing Act, 1925. That section provides (sub- "section 5) that the order of the Minister when made "shall have effect as if enacted in the Act. It was "contended before the King's Bench Division, and the "contention was accepted and acted on by the majority "of the Judges, that the validity of such an order, "being equivalent to an Act of Parliament, could not "be questioned in the Court, even though, as was "admitted in that Court, the Order was *ultra vires* the "Minister by reason of the non-fulfilment of certain "statutory conditions precedent to the Minister's "authority.

"In the Court of Appeal and in this House the "Attorney-General withdrew the admission made by "him in the King's Bench Division as to the invalidity "of the scheme, and it was not seriously denied that "if the statutory conditions were not fulfilled the "Minister would have no authority to make the order, "and that the question as to the fulfilment of such "conditions was open to inquiry in the Court.

"I think it is quite clear that to this extent the "validity of the order is open to question."

Lord Tomlin at p. 519-520: "My Lords, the first "question for consideration is whether by reason of "sub-section 5 of section 40 of the Housing Act, 1925, "your Lordships are precluded from inquiring into the "validity of the order made by the Minister of Health "on November 23, 1928.

"Upon this matter I entertain no doubt. The "Minister's jurisdiction to make an order is under the "Act strictly conditioned, and it is only when what is "done falls within the limits of the conditions imposed "that the order receives the force conferred by the "sub-section in question. When the legislature seeks "to produce a broader result other language is em- "ployed, as is well illustrated by the phraseology of "clause 2 of the Third Schedule of the Act now under "consideration.

"This view does not deprive the sub-section of effect. "Without the sub-section the legal operation of the "Minister's order would remain undefined. Nor is "there in my judgment anything in the decision of "your Lordships' House in *Institute of Patent Agents v.* "*Lockwood* (1), to preclude your Lordships from "attributing to the sub-section the meaning which I "have indicated.

"It is therefore in my opinion permissible and "necessary to consider the following questions— "namely:

"(1) Whether or not the conditions founding the "Minister's jurisdiction were fulfilled in the "present case; and

"(2) Whether or not the order made by him is in "relation to its context intra vires."

Lord Thankerton at p. 532: "In my opinion the "true principle of construction of such delegation by "Parliament of its legislative function is that it only "confers a limited power on the Minister, and that, "unless Parliament expressly excludes the jurisdiction "of the Court, the Court has the right and duty to "decide whether the Minister has acted within the "limits of his delegated power."

Lord Russell, who would have sustained the judgment of the Court of Appeal, necessarily took the same view as to the right of the Courts to question the order.

When these weighty pronouncements are considered, I cannot think that *Rex* (*Corporation of Limerick*) *v. Comerton* (2) can be held to govern the present case. Applying the principles enunciated by the Lords of Appeal to the present case—principles which are in full accord with those stated by Palles, C.B.—I am of opinion that the Court is entitled to inquire whether the conditions preliminary to the statutory jurisdiction given to the Civil Service Committee have been fulfilled. Ronan, L.J., in *Comerton's* case, seemed to be of opinion that if you found that a person claiming rights under this section was an officer, whether he was possessed of the qualifications set out in the section or not, full jurisdiction was given to the Local Government Board

(1) [1894] A.C. 347. (2) [1922] 2 I.R. 76.

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and their decision was absolutely final. I can see no ground for the discrimination he has made between the different conditions as I regard them set out in the section—their actual existence is a condition precedent to a valid award.

In my opinion in the present case it is essential that the plaintiff should be an officer who held on the passing of the 1919 Act a pensionable office, and who resigned with the sanction of the Civil Service Committee. The validity of the award depends on whether the conditions stated in the section existed so as to give jurisdiction—I must therefore consider whether these preliminary conditions existed.

At the hearing I had some doubt as to whether one in the position of the plaintiff, engaged as he was at a weekly wage, in the position of a caretaker, could be properly styled an officer, but the Local Government Act and the evidence given by Mr. Henry as to the appointment being made by the defendant Council themselves remove any doubt. That he held a pensionable office at the passing of the Act also seems to me to be free from reasonable doubt. Though the defendants are in the circumstances not precluded from making the contention that their action in granting him the pension they did was irregular, I am satisfied that while under the 1869 Act the grant of such a pension was not obligatory, it was perfectly lawful, and consequently I hold that the plaintiff was a " pensionable officer " within sec. 8 of the Local Government (Ireland) Act, 1919.

I now come to a matter that has given me a great deal of perplexity, and the decision I have come to is given with considerable hesitation. Looking at the policy of the section, it seems to me that what the Legislature wished to provide against was the resignation of an officer whom the local authority had no desire to dispense with, and who had no reasonable grounds for resigning. I hardly think that anything else was contemplated than that a resignation to impose on the local authority liability for a pension should not be permitted out of caprice, or self-interest on the part of the officer. The word used in the Act is " sanction "

and there are no words to show the time when that "sanction" should be expressed or how it is to be expressed. One cannot help observing, however, that if the sanction can be given retrospectively, it is the body itself which, as I have decided, has no jurisdiction till a sanction has been given which has the power up to the very moment of the award, to determine a point on which their very jurisdiction depends. The Civil Service Committee has purported to give the statutory sanction retrospectively, though a considerable time anterior to their award—and if that sanction is justified in law their award must stand apart from the defence of estoppel.

I have been referred to some cases in company law where sanction has been given retrospectively, and I have had recourse to the Oxford Dictionary, where one meaning of "sanction" is given as an express authoritative permission or recognition of an action. Legislation has also on some occasions in regard to consent or sanction used the words "previously given" which would indicate that apart from these words subsequent sanction might be given. Of course one must also look at the context and the mischief intended to be obviated by the requirement of a sanction. On the whole, I have come to the conclusion that the contention of the plaintiff on this point is right, and that the Civil Service Committee, which would have sanctioned his resignation if it had been applied for before it became operative, were within their rights in giving the sanction when they did.

Consequently the statutory conditions essential to the exercise of the powers granted to the Civil Service Committee have been complied with and they were entitled to make the award that is the subject matter of the action.

I do not think that anything the plaintiff has done by acceptance of the £12 pension acts as an estoppel.

Before concluding, I should like to express my appreciation of the spirit and manner in which this thorny question was dealt with both by the defendants and by the Civil Service Committee. In the circumstances it seems to me that the defendants had prac-

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tically no option to take any other course than that which they did, while the Civil Service Committee, if I may say so, exercised their functions in a most circumspect manner.

In the result, I find that the award is good, and costs must follow the event.

Solicitor for the plaintiff : *D. McLaughlin & Sons.*
Solicitors for the defendants : *Anderson & Co.*

J. R.

McEVOY v. BELFAST BANKING COMPANY LIMITED (1).

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May, 11, 12, 18. June, 1, 22.

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Feb., 8, 13, 15, 16, 20, 24.

Deposit Receipt in Joint Names—Advancement—Fraudulent intention—Money paid under Mistake of Law—Acquiescence.

On 20th July, 1921, John McEvoy, who was in ill-health, lodged with the defendant Bank £10,000 upon deposit receipt payable either to himself or his son (the plaintiff) or the survivor. This was done for the purpose not of changing the ownership but to avoid death duties. John McEvoy died on 20th September, 1921, and by his will left *inter alia* the residue of his estate to be held in trust for the plaintiff until he attained the age of twenty-five years and thereafter to the plaintiff absolutely. Pending the plaintiff attaining the said age the testator authorised his sister-in-law, Alice Kinney, to carry on his businesses on such terms as his trustees should think fit. On the death of John McEvoy and after the grant of probate the money on the £10,000 deposit receipt was transferred by the Bank to a new deposit receipt in the names of the trustees, on the basis that it still formed part of the deceased's estate. The businesses were carried on by Alice Kinney till 1925, then for a short time by a manager, and then by the plaintiff himself, but always at a loss, and monies from the deposit receipt were transferred by the trustees (who beyond signing blank cheques took practically no interest in and exercised no control over the business) from time to time to the current account of the businesses to discharge the overdraft thereon. The plaintiff acted as an intermediary in these transactions. Some time after attaining 21 years the plaintiff at the request of the defendants, signed a memorandum ratifying the transfers made prior to that date, and one of which for the purchase of some real estate had been made during his minority. With the exception of this transfer amounting to £2,076, the whole £10,000 was absorbed in the businesses before the plaintiff attained twenty-five years of age.

Held, by the Court of Appeal, affirming Megaw, J. :—

(1) That where the transaction is tainted with fraud the Court will not receive evidence of the intention so as to rebut a presumption of advancement, and that the defendants were not entitled to transfer the money standing in the joint deposit receipt for £10,000 at the death of the deceased, into the names of the trustees.

Held also (Best, L.J., dissenting) :—

(2) That the monies on deposit receipt had been paid or applied by the defendants for the use of the plaintiff.

(1) In the Court of Appeal before Moore, L.C.J., Andrews and Best, L.JJ.

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(3) That the payment was made with a full knowledge by both parties of relevant facts and that, though made under a mistake of law by both parties, it could not be recovered by plaintiff.

(4) That, even if the plaintiff was under a mistake as to his rights, there was no evidence that he was influenced by such mistake.

Action for a declaration that the plaintiff was entitled to monies represented by a deposit receipt of the defendants, dated 20th July, 1921, for the sum of £10,000, in the names of John McEvoy (since deceased) and the plaintiff and payable to either of the named parties or the survivor.

On 20th July, 1921, John McEvoy, an old customer of the Belfast Banking Company (Newry Branch), had a sum of £10,000 standing to his name on deposit receipt. This he withdrew and re-deposited in the Bank on a deposit receipt in the joint names of himself and the plaintiff, who was his only son and was then under sixteen years of age. The deposit receipt was payable to either John McEvoy or the plaintiff or the survivor.

John McEvoy had for many years carried on the combined businesses of licensed vintner, grocer and undertaker in Newry. In the early part of 1921 he had fallen into bad health and on 10th August, 1921, made his will.

By his will, the testator, after appointing James Adamson, James Kinney, and Edward Kinney, executors and trustees, and after giving a number of pecuniary and charitable legacies, left the residue of his property to be held in trust for the plaintiff until he should attain the age of twenty-five years and on his attaining the said age for him absolutely and pending his attaining the said age he authorised his business to be carried on by his sister-in-law, Alice Kinney, on such terms as his executors in their absolute discretion should arrange.

John McEvoy died on 20th September, 1921. On 22nd October, 1921, an envelope was left by the executors with Mr. Coleman, the manager of the Newry Branch of the defendants, for safe keeping. On being opened on 25th January, 1922, after probate

was granted, it was found to contain the deposit receipt for £10,000 in question in the action, and another deposit receipt for £2,000 in the sole name of John McEvoy. Probate of the will was granted to all the executors on 16th December, 1921.

On 25th January, 1922, the £10,000 on deposit receipt was transferred by the Bank to a new deposit receipt in the names of the trustees and executors, on the basis that the money still formed part of the estate of John McEvoy notwithstanding the transaction of the 20th July, 1921, and the form of the deposit receipt.

The plaintiff, giving evidence, said that in July, 1921, his father and he went to the defendant's Newry Branch, and that, in his presence, his father had an interview with Mr. Coleman and, after a discussion, his father took out the deposit receipt in the joint names. After his father's death, early in 1922, having heard that the deposit receipt had been changed into the names of the trustees, he asked Mr. Coleman why this had been done, and Mr. Coleman had told him that, as plaintiff was a minor, it would save compound interest if so changed. At another interview, which took place after he had left school in the summer of 1923, he again asked why the deposit receipt had been changed, and Mr. Coleman had said it was changed under the will and belonged to the trustees until plaintiff attained twenty-five years.

Mr. Coleman contradicted both these statements and swore that on the 19th July, 1921, as the result of a verbal message from the deceased he visited deceased, who told him he intended to settle his affairs. He also deposed that the conversation about the deposit receipt for £10,000 related to the avoidance of estate duty and that deceased agreed to send the deposit receipt over to the Bank to be put in the names of himself and the plaintiff payable to either or the survivor. The learned Judge at the trial found " that " plaintiff was aware, if not before his father's death " at any rate very soon after, that his name was on " the deposit receipt, that the change was made for a " purpose connected with avoiding death duties, and

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"that the executors had had the sum transferred to "their names."

The executors and trustees opened three accounts in the defendant's bank, one connected with the businesses, another with the rents of house property, and the third an administration account. The business was carried on uninterruptedly, Miss Alice Kinney acting as manager according to the trusts of the will. The cheques were signed by the four executors and then filled in by Miss Kinney during her managership.

After his father's death the plaintiff returned to Castleknock College and remained there until the Summer of 1923, when he went into the business. The plaintiff was normally present at trustees' meetings and was taken by them to their solicitors when business affairs were under discussion.

The businesses as carried on were never prosperous. Under Miss Kinney, who managed them for three years, there was a marked loss in the last year. After her marriage, in Easter, 1925, the trustees brought in a new manager called Murden. During his managership the businesses continued to lose money. The plaintiff, who attained twenty-one years of age in 1926, during Murden's managership, began to take more control. For some time, from Easter, 1927, to February, 1928, there was no other manager except the plaintiff himself, and from July, 1929, he was solely in charge.

The first transaction with the defendant's bank, in connection with the deposit receipt for £10,000, was on 27th February, 1925, when £257 12*s.* 10*d.*, interest which had accrued, was transferred to the current account of the business. The £10,000 put on deposit receipt in January, 1922, remained intact with the interest that had accrued, other than the £257 12*s.* 10*d.* till 1st May, 1925, when the Rooney Terrace property was bought.

As a result of an application by the plaintiff and Adamson, one of the trustees, forwarded to the Head Office by Mr. Coleman, the Head Office agreed to the withdrawal of £2,076 from the moneys on deposit

receipt to pay the purchase price of this property. (The plaintiff was then a minor but he took an active part in this transaction and when the property was finally sold on 6th November, 1931, the plaintiff himself received the proceeds of the sale.) All the moneys, after deducting the £2,075, were relodged on the same day in the names of the four trustees (one, absent in America, acting by power of attorney).

The overdraft in the business had been increasing and Mr. Coleman wrote several times to Adamson on the subject. On 22nd December, 1926, the plaintiff having come of age wrote the following letter with reference to the deposit receipt to Mr. Coleman :—

" Dear Sir,

" With reference to the endorsing of the deposit " receipt Mr. Adamson was here with me yesterday " evening and he told me to inform you that he is " going to arrange a meeting of the executors for " next Tuesday, 27th December, 1926, and that he " will call with you on that date and complete the " endorsing of the deposit receipt and arrange to " have some money transferred into the shop a/c."

On 7th January, 1927, £1,709 was transferred from deposit receipt to the current account. This left £7,000 on deposit receipt. On 14th April, 1927, the following letter or memorandum, in the plaintiff's handwriting, was addressed to Mr. Coleman :—

" Sir,

" I, the undersigned have attained my 21st " birthday on 14th November of last year.

" The Banking business as conducted under the " title of Adamson & Others has my personal " supervision.

" I would like to inform you, that its conduct in " so far as the Bank is concerned, has my entire " approval.

" As I alone fill out the cheques for payments " and as the cheque book is under my control, you " will readily understand and appreciate the safe- " guards at my disposal. I am prepared to accept " my responsibility and at no time in the future will " I in any way harass or blame the Bank, knowing

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"full well that your records are always open for "my inspection.

"I am, Yours faithfully,

"Joseph D. McEvoy."

The letter was drafted at the Bank and given to the plaintiff who took it away with him.

On 7th April, 1927, Mr. Coleman wrote a long letter to Adamson stressing the responsibility of the trustees.

In October, 1927, the deposit receipt was given to the plaintiff, taken by him to the trustees who endorsed it and £3,142 6*s*. 0*d*. transferred to current account, and a new deposit receipt given for £4,000. These transfers were duly entered in his own ledger by the plaintiff.

Following another letter, dated 24th September, 1928, from the plaintiff to Mr. Coleman, a further transfer was made to the current account leaving only £1,000 of the original deposit receipt of £10,000.

On 17th June, 1929, Mr. Coleman wrote to the plaintiff the following letter:—

"Dear Sir,

"Account is £850 overdrawn now so that it is "worse since I mentioned it to you three weeks ago. "Deposit Receipt £1,000 must be lodged before the "29th. Please have this done as my directors "wish it."

The plaintiff wrote Mr. Coleman on 19th July, 1929, and enclosed deposit receipt. The £10,000 on deposit receipt had now been fully absorbed in the business.

On 1st April, 1930, Messrs. Fisher & Fisher, who were now advising the plaintiff, asked on his behalf for an overdraft of £350, a request which was refused. On 20th November, 1930, the plaintiff having attained twenty-five years, Messrs. Fisher & Fisher again applied on his behalf for an overdraft, this time for £650, on the security of Rooney's Terrace. The request was refused on 26th November, 1930, and on 28th November, 1930, Messrs. Fisher & Fisher wrote demanding particulars of the deposit receipt.

Megaw, J. June 22,

Megaw, J.: This action was brought for—

(*a*) A declaration that the plaintiff is entitled to

the monies represented by a deposit receipt of the Belfast Banking Company Limited No. 65564, dated 20th July, 1921, for the sum of £10,000 in the names of John McEvoy (since deceased) and the plaintiff and payable to either of the named parties or the survivor.

(*b*) An account of the interest due in respect of the money comprised in the said deposit receipt.

(*c*) Payment of the sum of £10,000 together with the sum found due as interest thereon.

(*d*) The sum of £10,000 with interest thereon from the 20th day of July, 1921, as money had and received by the defendants for the plaintiff's use.

(*e*) Delivery to the plaintiff of the said deposit receipt.

The questions for decision are concerned with money lodged on deposit receipt in the Belfast Banking Company (Newry Branch) by one John McEvoy. On the 20th July, 1921, John McEvoy, who was an old customer of the Newry Branch of the Belfast Banking Company, had a sum of £10,000, which was standing in his name on deposit receipt, withdrawn and, after giving directions to the branch manager as to the accrued interest thereon, redeposited the £10,000 in the Bank on a deposit receipt in the joint names of himself and the plaintiff, who was his only son and was then under sixteen years of age. The form of the deposit receipt on which the lodgment was made is probably better known among the Irish Banks than in Great Britain. It was expressed to be made payable to either John McEvoy himself or Joseph D. L. McEvoy (the plaintiff) or the survivor. I shall have to analyse the effect of this more closely at a later stage.

The circumstances in which the transaction took place are the subject matter of contradictory evidence. Uncontested facts, however, may be first stated. John McEvoy had for many years carried on the combined businesses of licensed vintner, grocer and undertaker in Newry. In the early part of 1921 he had fallen into bad health and had brought Miss Alice

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Kinney, the sister of his deceased wife, to assist him in his businesses. The plaintiff, who had been a pupil in Castleknock College, Dublin, was brought home some time before, as apparently John McEvoy anticipated an early fatal termination of his disease. On 10th August, 1921, John McEvoy made his will. I gathered that he had sought some medical advice in Dublin between the Bank transaction and his will.

By his will the testator appointed James Adamson, of Banbridge, in the County of Down, merchant, Patrick McEvoy, of Cloghogue, James Kinney and Edward Kinney, both of Killen, all in the County of Armagh, farmers, to be his executors and trustees; he gave a number of pecuniary and charitable legacies and dealt with the residue as follows:—

"All the rest residue and remainder of my property "is to be held in trust for my son Joseph Dominick "Laurence McEvoy until he attains the age of "twenty-five years and on his attaining said age "for him absolutely and pending his attaining said "age I authorise my said business to be carried on "by my sister-in-law, Alice Kinney, on such terms as "my executors in their absolute discretion may "arrange. In case my said son should die under "the age of twenty-five years I will that one "thousand pounds should be paid to Most Reverend "Edward Mulhern or the Bishop for the time being "of the Diocese of Dromore, for such charitable "objects in said Diocese as he in his absolute discretion may think fit and the residue as to one "moiety thereof amongst the next of kin of my late "wife and as to the other moiety amongst my own "next of kin living at my son's death and according "to the Statute of Distributions."

Mr. Gartlan, a highly respectable Newry solicitor, apparently drew the will, and he and Constantine McNulty were witnesses of its execution. McEvoy died on 20th September, 1921. Some time after, a rather curious transaction took place: an envelope was left on 22nd October, 1921, by the executors with Mr. Coleman, the manager of the Newry Branch of the defendants, for safe-keeping. Afterwards, on being

opened on 25th January, 1922, after probate was granted, it was found to contain the deposit receipt for £10,000 in question in the action, and another deposit receipt for £2,000 in the sole name of John McEvoy. Probate was granted to all the executors on 16th December, 1921, through Messrs. Hunter Moore & Boyle, solicitors, as Mr. Gartlan, the solicitor who drew the will, insisted on the disclosure in the affidavit leading to probate of the two deposit receipts, which clearly were bound to be disclosed, no matter what view might be held as to the effect of the transaction of July, 1921. The probate was noted by the defendants on 20th December, 1921, in Newry, and on 21st December, at their Head Office.

On 25th January, 1922, the money on the £10,000 deposit receipt was transferred by the Bank to a new deposit receipt in the names of the trustees and executors, on the basis that the money still formed part of the estate of John McEvoy notwithstanding the transaction of July and the form of the deposit receipt. It is this action on the part of the defendants that is challenged, and the effect of it has to be considered in this action. A further question has to be considered, viz., if, in fact the money was wrongly transferred, whether the dealings of the plaintiff in regard to it relieve the defendants from liability to the plaintiff.

The plaintiff was the first witness called. I formed the impression from his evidence, both on the direct and on cross-examination, that he is a young man of great ability and intelligence in business matters, though it is also clear that his habits have been by no means temperate. After mentioning the death of his mother when he was four years of age and stating that he went to school in Castleknock in 1919, and that he stayed at home from Easter, 1921, till after his father's death and went for drives with his father, he went on to say that his father and he went to the Belfast Bank in July. In his presence his father had an interview with Mr. Coleman, the manager of the Newry Branch of the defendants ; he can't recollect what was said but after a discussion his father took out the receipt in

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the joint names. It was changed into the names of "myself and father." "My father said nothing to me "when that was being done." In cross-examination he mentioned that it was he who drove his father to the Bank, that he couldn't say whether his father filled up any form of request, but that he saw Mr. Coleman at the counter at his own private desk.

This evidence is entirely contradicted by Mr. Coleman, but if it be true, it seems inconceivable that a father intending to make an absolute gift to his only son, from whom he knew he was soon to part, would take him to the Bank, carry on such a conversation in regard to his interests, and say nothing to him as to his intentions. This is the transaction, and it is on this evidence, and the actual change of name on the deposit receipt in the form that it took, on which the plaintiff relies.

The next event deposed to by the plaintiff was an interview with the manager after his father's death. To this interview the plaintiff at different times assigns differing dates. He first mentioned it as having taken place in January and then changed the date to Easter, 1922. He says that having heard that the deposit receipt had been changed into the names of the trustees, he asked Mr. Coleman why this had been done and that Mr. Coleman replied that as plaintiff was a minor it would save compound interest if so changed. Again, he dealt with another interview with Mr. Coleman. My note of the evidence reads: "I saw "Coleman on another occasion about eight months "after when I came home from school altogether. "I remained at school till summer, 1923. It was after "I left school. I asked why the deposit receipt was "changed and he said it was changed under the will "and belonged to the trustees till I was twenty-five. "These were the only two occasions, and I accepted "what Mr. Coleman said." At a later stage I asked plaintiff did he not recognise that these replies were inconsistent. He said that he did but took no steps to have his doubts cleared up.

If this evidence stood uncontradicted, it is clear that plaintiff knew in July, 1921, about the original

transaction, that he knew what the Bank had done at the time it was done, that his inquisitive intelligent mind was awake to his own interests, but that having got what he admitted were inconsistent and unconvincing explanations from the bank manager, he remained quiescent until Mr. Fisher made him acquainted with his rights at the end of 1930.

Mr. Coleman gives an entirely different account of the transaction. My note of it reads as follows:—"19th "July, 1921. Got a verbal message from McEvoy that "he wanted to see me after Bank. Went over to his "house; saw him—sitting up in drawingroom upstairs. "Was very ill—internal disease; he realised that he was "near death. Adamson and Edward Kinney were with "him. Had conversation. About his affairs—will—"generally; told me he was going to settle affairs. "Gave names of four executors. He said he was "going to leave all to his son, to tie it up till he was "twenty-five; that Miss Kinney would manage "business. Conversation about deposit receipt "£10,000. Related to estate duty. McEvoy very "careful and not anxious that estate duty should be "paid. He said so. Adamson also said he wouldn't "pay estate duty at any price. They asked my "opinion. I said I could'nt tell them. Then they "said if there could be two names, would it meet the "case. Mr. McEvoy and Mr. Adamson also. I said I "didn't know, they should see their lawyer, he would "be able to advise them. Agreed to send it over in "the morning to put in two names. McEvoy gave the "directions. He said put it in names of self and son "payable to either or the survivor. Adamson was "with him. Knew he was under age. Quite cus-"tomary to issue deposit receipt in that form and to "minors. He said he would require cash £20 and "balance to account. I went away. Old deposit "receipt sent to me next morning. Mr. Edward "Kinney brought it. Endorsed by John McEvoy.

£20
£36 14*s.* 3*d.*
£10,000

"Filled deposit receipt in two names as directed.

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"Identifies deposit receipt of July, 1921. Requisition "form—filled up in my own handwriting, not signed. "We keep them with records. It is not so that "plaintiff brought his father down to Bank. He was "not in the Bank on that day. I never saw him again "alive. Bank afterwards received probate of will "from Hunter Moore & Boyle."

While Mr. Coleman was not straightforward nor accurate in his evidence with regard to his knowledge of the avoidance of death duties by the executors, I feel bound to accept in substance his evidence with regard to the transaction connected with the deposit. Mr. Adamson was not called by either side. He was not, I think, a customer of the defendants, and though it was stated but not proved that the plaintiff had issued a writ against the executors, there did not seem to be any strained relations between him and the plaintiff. It may be that Mr. Coleman has after ten years forgotten interviews. It may be that the plaintiff did accompany his father to the Bank, but I certainly cannot regard Mr. Coleman's evidence of the interview in McEvoy's house as a concocted story. I am quite satisfied, however, that plaintiff was aware, if not before his father's death, at any rate very soon after, that his name was on the deposit receipt, that the change was made for a purpose connected with avoiding death duties, and that the executors had had the sum transferred to their names.

January, 1922, was an impossible date for the first interview to which plaintiff deposed. It was only on 25th January, 1922, that the deposit receipt was transferred, and plaintiff could not have interviewed Mr. Coleman on the subject if he had returned at the beginning of the term to Castleknock.

In the light of these facts the first defence raised by the pleadings may be considered. It is clear that there was no immediate gift made to the plaintiff by the transaction of 20th July, 1921. The nature of a transfer to joint names was dealt with by Parker, J., in *In re Warwick, Warwick v. Chrisp* (1), and the effect of a deposit receipt like the present was the subject of a

(1) 56 Sol. J. 253.

decision by O'Connor, M.R., in *M'Dowell v. M'Neilly* (1).

[His Lordship then read the judgment of O'Connor, M.R., at pp. 121 and 122 of the report.]

From this it would appear that any declaration made by the original owner while the gift—if I may so call it—was ambulatory would not fall within the principle that declarations of intention by the donor made in his will or otherwise after the date of transfer cannot be given in evidence, as otherwise a donor might revoke his gift. In the present case John McEvoy had full power over the fund during his lifetime, and if there were any doubt about his intention I should have no hesitation in admitting any declaration made in regard to it during his lifetime, while he, holding in his own custody the deposit receipt, could dispose of it as he wished. Indeed, in the present case one might properly consider the transaction of 20th July, 1921, and the will made on 10th August as interlocked transactions. However, there can be no doubt what the intention of the deceased was. The name in the deposit receipt was changed, not to take the beneficial interest away from John McEvoy or his estate, but to enable the executors to commit perjury in their affidavit after John McEvoy's death without running the risk of being found out, and in order that no complications might arise with unsuspecting banks, whose state of knowledge is so conveniently characterized by a baby-like innocence or the reverse according to circumstances. Mr. Coleman, however, was acquainted with the motive of the transfer and his sublime ignorance of what the effect of it might be was in accordance with the best traditions of a well-trained bank official.

The proved intention of the settlor would in ordinary circumstances refute the presumption of an advancement, and equity would have regard to the intention and treat the money as belonging to the settlor. In point of fact, in the present case the transaction could in no circumstances have lawfully averted the dreaded liability to estate duty. As I have said, it would make the subsequent perjury more capable of effecting its object. The transaction, however, is tainted with

(1) [1917] 1 I.R. 117.

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illegality. I am not sure that *Childers v. Childers* (1), with its subsequent history, is a very convincing authority, nor do I think that the cases cited by Mr. Black in regard to legacy duty really touch the present case ; and though it is stated on high judicial authority that public policy is a very unruly horse and when you get astride of it, you never know where it will carry you, I do think that the principles laid down in *Gascoigne v. Gascoigne* (2), apply to the present case, and that where a transaction such as the present occurred, the doctrine supporting the preponderating right of the person in possession applies. On the death of John McEvoy the plaintiff became the legal owner of the money on deposit receipt, and equity cannot be called into action in a case of the kind to undo a consequence of such a flagrant transaction. The executors in due course followed the policy arranged by the deceased and Mr. Adamson, and concealed not only the £10,000 receipt but the other of £2,000, notwithstanding the remonstrance of Mr. Gartlan, who was thrown over as solicitor and adviser by reason of his honest and straightforward advice.

Accordingly, though I have no doubt that there was no intention to take this sum of £10,000 out of the estate of the deceased or the operation of the will, I feel bound to hold that, in the circumstances, the Court must at this date leave the ownership in the condition it was as between the plaintiff and the estate at the death of John McEvoy. The defendants can have no higher rights than the executors. The Bank found themselves at John McEvoy's death by their own contract the debtors not to the trustees but to the plaintiff. Accordingly, on this issue, I must decide against the defence raised by paragraph 1 of the Defence.

But this does not put an end to the action.

The defendants rely on an alternative defence, viz., that as the plaintiff was a party to and so acquiesced in and ratified the dealings of the executors and trustees and the action of the Bank in advancing the moneys to meet the trading account of the business, with which the plaintiff has been associated almost since

(1) 3 K & J. 310. (2) [1918] 1 K.B. 223.

his father's death, the moneys on deposit receipt must be held to be paid or applied by the defendants for the use of the plaintiff.

In regard to this defence, it is necessary to weigh the evidence in regard to the conduct of the business.

John McEvoy, as I have said, carried on an extensive business in Newry in three departments. In his will he had evidently contemplated that these should devolve on his son. The executors and trustees, as I have stated, concealed in their affidavit of assets the existence of the two receipts. They opened three accounts in the defendants' Bank, No. 1 connected with the businesses, No. 2 with the rents of house property, and No. 3 an administration account.

The business was carried on uninterruptedly, Miss Alice Kinney at first acting as manager according to the trusts of the will. The cheques were signed in batches by the four executors, at first in Messrs. Hunter Moore & Boyle's office, and then filled in by Miss Kinney during her managership. After his father's death, the plaintiff returned to Castleknock and stayed there, being blessed or cursed with a very liberal allowance of pocket money, until the summer of 1923, when he went into the business. Whatever criticism may be made against the trustees for their management of affairs, they certainly did not err on the side of strictness with the plaintiff. The case was opened as if he were a mere message boy, but throughout the case I did not see a single instance of any control being exercised over him, by manageress or executors, unless for the blow deposed to by Kinney. The executors, no doubt looking forward to the extreme probability of his ultimately succeeding to the control of all, as his father had wished, seem at no stage to have checked his drawings of such moneys as he wished, and he was normally present at trustees' meetings and was taken by them to their solicitors when business affairs were under discussion. From beginning to end, I don't see a trace of evidence of concealment by the trustees from the plaintiff of his rights, or any deception on their part.

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The businesses as carried on were never prosperous. During the first two years of Miss Kinney's management, according to the accounts produced on behalf of the plaintiff, there was a slight profit, but the last year of her management was marked by a serious loss. She married an assistant in the business, Con McAnulty, in Easter, 1925, and they set up a rival business. Then a manager called Murden was brought in by the trustees. During his managership the businesses continued to lose money. The plaintiff, who attained age during the period of Murden's management, took more and more control. Shortly after Miss Kinney's departure, the plaintiff took a very active part in the purchase of some houses in Rooney's Terrace, in May, 1925, a transaction in respect of which the defendants claim to be relieved from liability as against the advance of the purchase money. From all the evidence I am satisfied that the plaintiff was, though a minor, in the centre of this transaction, and it is perhaps the only profitable transaction in the sordid history of the McEvoy estate. It is significant of his position when in his own evidence plaintiff says: "Hunter Moore & "Boyle rang me up. Boyle asked me to take Adamson "over to see the property." The plaintiff advocated the purchase and was conversant with the financing of the transaction. It was actually financed by a transfer of the funds that had been taken from the deposit receipt sued on and placed on 25th January, 1922, in the names of the trustees. This sum was clearly earmarked and this was the first transaction by which the capital sum of £10,000 was depleted. A sale was made last year of this property and the proceeds of the sale have found their way into the plaintiff's pocket. Yet in this Court of Equity he demands that the £10,000 should be paid to him without any deduction in respect of the proceeds of the property.

It is hardly conceivable that during this time and when this transaction was completed, the plaintiff, who was often at the Bank, who was calculating the value of the investment, who, according to his own account, had been present when the deposit receipt was originally put into the joint names, who had

interrogated Mr. Coleman as to the reasons for the change, was asleep as to his rights in the matter. Weighing all the evidence, I should say that, while there was some sort of a divided control of the businesses under a lax supervision of three trustees when Murden was manager, after his departure the plaintiff was the real master. For some time, from Easter, 1927, to February, 1928, there was no other manager except the plaintiff himself, and from July, 1929, he was solely in charge. He had attained age in November, 1926, and from that time he had practical control of the filling in of the cheques. As Mr. Thompson, of the firm of Atkinson & Boyd, who first audited the accounts for the trustees, said in his evidence, it was the plaintiff who priced the stock for the auditors, and the auditor looked to him for that. He was the man in control then (in 1925) and was the brains of the place. The ledger was entirely in his handwriting. It is found by the auditors "to be kept in a very irregular fashion," and in his evidence Mr. Thompson said there was a "leakage" more pronounced in 1925. To a question put by me, plaintiff answered: "No salary was paid "me. I just took whatever I liked." As the plaintiff himself deposed, the trustees never interfered with his drawings, which were for the most part cash drawings. There is some evidence that some of these were occasionally entered in the books, but the reports of the auditors show that very large sums were unaccounted for in the books.

Messrs. Sheeran, Carton & Co. were, according to the plaintiff, asked to audit the accounts at his instance, really to meet the demands of the Income Tax authorities. In answer to Mr. Lowry, plaintiff said: "it was at my instance audit was taken and they "reported to me." The first report of Messrs. Sheeran, Carton & Co. was made on 24th April, 1928. It was addressed by them to "the Reps. of John McEvoy, "deceased." It was made at a time after Murden left and covered the period in which plaintiff was sole manager before McParland, the succeeding manager, came, when admittedly there was no other manager than the plaintiff. It was a very damaging report,

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condemning the system of book-keeping suggesting leakages of cash and/or stock during the period 6th December, 1926, to 31st January, 1928. The second report covers the period from 1st February, 1928, to 30th April, 1930, and was made to the plaintiff himself. If the first report was bad, this was still worse, but the plaintiff, who was of age and, I am satisfied on the evidence, in virtual control of the businesses, made no attempt to change his ways.

Three of the executors during this time were legally responsible for the carrying on of the business. The fourth disappeared at an early stage to America. They never exercised more than a nominal supervision. Probably they regarded their responsibility as only being concerned with the plaintiff, and that as he was of age and managing it according to his own ideas, they should not challenge the management. So far as I can see, Adamson was the most active. He was friendly to the plaintiff. He interested himself in the purchase of the Rooney Terrace property, for a time collecting its rents and, to the knowledge of the plaintiff, charging a commission therefor. He and the other trustees signed cheques in blank necessary for the business, which were at first given to Miss Kinney, and afterwards were left in the business establishments, when they were filled in first by the manager, afterwards, when plaintiff came of age, mostly by him, but at times by McParland. The trustees from time to time would drop in to the business concerns and have a look at how trading was going on, but apart from their appointing the two managers, and signing blank documents, including deposit receipts, I do not see that they exercised any control. Indeed, McParland's appointment was made at the instance of the plaintiff, who, recognising the penurious views of Adamson as to remuneration of managers, for a time deceived Adamson as to the amount of salary which was actually paid to McParland. The agreement with McParland signed by Adamson apparently was 35*s.* 0*d.* a week. The sum actually paid during his tenure of the post was £2 10*s.* 0*d.* McParland's evidence was impeached where it differed from the plaintiff's. To me it seemed

that McParland was a reliable witness, and I may say that I believed his evidence which is of considerable importance as regards the knowledge which the plaintiff had of his own position and rights.

Adamson had a paralytic stroke in 1929 and from that time he is not shown to have done anything more than sign his name, and plaintiff himself says that it was on his report that McParland was dismissed. This was in July, 1929. After that no person in the position of manager appeared in the business other than the plaintiff.

Let me now turn to the important dealings with the Bank that took place through these years.

Consistent with the legal position, the No. 1 business account being in the name of the trustees, the defendants through Coleman, the manager, dealt at first chiefly with Adamson, the acting trustee. The defendants had interpreted the law for themselves and decided that the moneys on deposit receipt still remained part of the estate of John McEvoy, and they so dealt with the money on deposit receipt all through, though it is clear they never left out of sight the fact that the person most interested in that estate was the plaintiff, and the dealings show that from the time he came of age they laid great stress on his being acquainted with and acquiescing in the disposal of the fund on deposit receipt. There does not seem to have been any correspondence in regard to the advance made for the Rooney Terrace property. There had been some withdrawals and relodgments, including a transaction on 27th February, 1925, when £257 12*s.* 10*d.* interest which had accrued was transferred to current account. The plaintiff was in the business actively engaged at 27th February, 1925, but he is not shown to have had any special knowledge of the transaction in regard to the transfer of the £257 12*s.* 10*d.* to current account. The £10,000 put on deposit receipt in January, 1922, remained intact with interest that had accrued other than the £257 12*s.* 10*d.* till 1st May, 1925, when the Rooney Terrace property was bought. I accept Mr. Coleman's evidence in substance in regard to what took place at that transaction. As the result

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of an application by the plaintiff and Adamson, fortified by Mr. Boyle, forwarded to the Head Office by Mr. Coleman, the Head Office agreed to the withdrawal of £2,076 from the moneys on deposit receipt to pay the purchase money of this property. Plaintiff was then a minor but he had a very active voice in the transaction, and the moneys spent on it have been repaid in full to him or his account within the past two years.

At that time all the moneys remaining after deducting the £2,076 were relodged the same day in the names of the four trustees (the absent one acting by power of attorney). As might have been expected from the facts I have mentioned, the overdraft in the business was increasing rapidly and more than once Mr. Coleman writes to Adamson on the subject, and I am satisfied that Mr. Coleman also had discussed the matter with plaintiff, who was often in the Bank.

Plaintiff came of age in November, 1926. On 22nd December, 1926, we find a memorandum of plaintiff to Mr. Coleman specially referring to the deposit receipt. This is not the letter of an unsophisticated child. He knew then that the deposit receipt had been in his own name. He also knew that the business was his and that he would come into complete ownership if he lived till he was twenty-five. He knew that the present deposit receipt, less the Rooney Terrace purchase money, represented the money that was once in his own name and had been transferred to the names of the trustees. With that knowledge, without a suggestion of duress or deception on the part of the trustees, he became at the very least an intermediary in the transfer of the £1,709 17*s.* 6d. With that letter of 22nd December before them, what were the defendants to think? This young man engaged in the business of which he was the owner to all intents and purposes joins in arranging with the trustees for a transfer from deposit receipt to the current account of moneys that were, as events turned out, and as seemed probable, then destined to be his own. It is said he did not know what his rights were, that he did not know that he might have brought the business to

an immediate downfall by insisting on those rights and insisting that the moneys were his own. He who, according to himself, had been duped by Mr. Coleman five years before, had fully accepted Mr. Coleman's statement, and now without a question or remonstrance writes the letter of 22nd December, 1926. In any case, £1,709 was withdrawn on 7th January, 1927, and I believe the evidence of Mr. Coleman, who says that plaintiff directed him to put it to the current account. £7,000 was then left on deposit receipt, and plaintiff made specious promises as to the future conduct of the business and getting in outstanding debts.

On April 14th, 1927, at the instance of the manager of the Newry Branch of the defendants, an important letter or memorandum is written. At first, after hearing Mr. McGonigal's skilful opening of the case, I was disposed to believe that the plaintiff had no knowledge of affairs and to think that an undue advantage was taken of youth and inexperience ; after I saw the plaintiff I modified my view. The letter was drafted at the Bank and given to McEvoy, who took it away with him. There is no suggestion of anything like deception or duress. It is a pity the plaintiff was not told to consult his solicitor in regard to it, but on cross-examination plaintiff practically admitted all the averments it contained. The document is undoubtedly in the handwriting of the plaintiff. Though it is not an estoppel, it is a powerful piece of evidence, especially in view of the conduct of the business for the next three years. The plaintiff was no child, he was not under the influence of the trustees, nor the Bank. He was a young man who might have been a very successful business man if his energies and talents had been better directed. If I can form an opinion from his appearance in the witness box, he has a very considerable knowledge of the world and business affairs. He must have recognised the fact that the Bank had some compunctions as to their transactions with the trustees and were desirous to have a written acknowledgment of his consent to the dealings which had taken place during his minority.

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Practically at the same time, viz., the 7th April, 1927, Mr. Coleman wrote a long letter to Adamson marked "Private and Confidential," on which the plaintiff strongly relies. Undoubtedly this letter stresses the responsibilities of the trustees, who were principals in the accounts so far as the Bank was concerned. In the draft Mr. Coleman had submitted to the plaintiff his "responsibility" was also referred to, and I do not see that this letter assists the plaintiff. The Bank officials were nervous and wished to have trustees and beneficiary kept aware of their responsibilities, and I think they desired to have two strings to their bow, and keep open possibilities of getting indemnified against loss in respect of everyone concerned with the affair.

The next transaction affecting the deposit receipt moneys took place in October of the same year. I see no reason to doubt the evidence of Mr. Coleman that in this McEvoy, the plaintiff, was the intermediary. The deposit receipt was given to him, taken by him to the trustees, was indorsed by them, £3,142 6*s.* 0*d.* transferred to current account, and a new deposit receipt given for £4,000, and this left the current account in credit. These transfers were duly chronicled in the ledger by the plaintiff.

The last letter written by Mr. Coleman to Adamson was 4th June, 1928. The plaintiff since he came of age was evidently taking the dominant part in the business.

A letter of 10th July, 1928, by the plaintiff to Mr. Coleman is illuminating. At this time Mr. Coleman recognises McEvoy as the master of the business, just as at an earlier date Messrs. Atkinson & Boyd, and at this time, Messrs. Sheeran & Carton recognised him. After another letter of 24th September by the plaintiff to Mr. Coleman, another raid is made on the deposit receipt—again this was done through the plaintiff, and only £1,000 of the £10,000 now remained.

On 19th February, 1929, the plaintiff wrote again to Mr. Coleman. If words mean anything, these show that the plaintiff at any rate assumed that he was in command. Mr. Coleman's letter of 17th June is to

the same effect and the deposit receipt through plaintiff has now been fully absorbed in the business—all the payments being made with the full knowledge of the plaintiff, and I might add *quorum pars magna fuit.*

Messrs. Fisher came on the scene early in the next year. On 1st April, 1930, on behalf of plaintiff, they ask an overdraft of £350, a request which was turned down. On 20th November, after referring to the plaintiff's having attained twenty-five, they ask again for an overdraft, now of £650, on security of Rooney's Terrace ; and make complimentary references to the friendly relations in the lifetime of deceased's father. The request is refused on 26th November, and straightway on 28th November, 1930, comes the demand for particulars of the deposit receipt and the expression of consternation by the writers because of the non-disclosure of its existence in the probate.

It was only then, according to the plaintiff, that he became acquainted with his rights, after the proceeds of the deposit receipt had become exhausted and after the Bank declined to give him a further overdraft.

Assuming, as I have already decided, that the Bank acted wrongly in January, 1922, in taking the moneys on the deposit receipt and putting them, less interest, to a new account of the executors as if they were moneys of the estate, what consequences follow ?

This transaction in law was a conversion which occurred at that date, but at a date on which the plaintiff was an infant. The fund was earmarked and can be traced all through the various dealings. In the view that I take of the law, the plaintiff could on attaining age have brought an action against the Bank in which he would have succeeded, though on equitable grounds, the Rooney Terrace property would have been available to recoup the Bank, as I cannot see on what principle the plaintiff could retain the entire £10,000 and the Rooney Terrace property. They would thus have had in their power the deposit receipt for £8,309 and the Rooney Terrace property available.

In considering how after events may affect the position, one cannot leave out of sight that if the

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plaintiff attained the age of twenty-five, he would, as he knew, succeed to all the estate of his father, and that, when he was for all practical purposes given dominion over the moneys transferred to the names of the executors, it did not much matter whether they had been placed in his own name or the names of the trustees. As I have already said, I have seen no evidence that would suggest that the executors deceived the plaintiff in any way. I should gather, indeed, that he knew the facts from the first. I don't believe that Mr. Coleman deceived him. Plaintiff's own admission shows that he knew immediately after, if not before, his father's death that the money had been placed in the joint names payable to the survivor. He does not say from whom he heard it, but he says he asked an explanation from Mr. Coleman. Would his enquiring mind be satisfied with the feeble replies that he attributed to Mr. Coleman ? In any case, he knew of the transfer and he knew how the deposit receipt stood when he came of age. He was a party to all which had taken place during his minority, transactions which, during those years when he in reality managed the business, transferred the moneys which he now claims to himself while his facile trustees looked on and lightheartedly permitted him to squander. It is all a sordid story. None of the parties, plaintiff, defendants, trustees, have reason to be satisfied with their conduct, but the plaintiff presents a sorry spectacle to-day. He has dissipated his valuable patrimony and, having done so, now asks a Court of Equity that he shall have it all over again.

If in such circumstances as the present, a Court of Equity would be bound to decide in favour of the claim, it would seem a perversion of right and justice. I have come to the conclusion on the evidence that the payments made out of moneys to which he was entitled to the current account were made at the instigation of and with the full consent and authority of the plaintiff when he was a free and informed agent, and I also incline to the view that in the circumstances he is estopped, having for over four years after coming of age, dealt with the defendants as he has done, from

making his present case. I place no reliance on his evidence that it was only in November, 1930, after consulting Messrs. Fisher he learned his rights. I believe from the evidence given by McParland, supported by McAnulty. that in the year 1929 the plaintiff had already conceived the scheme which he has attempted in this action, viz., to get a second payment of the amount in the deposit receipt.

I have no hesitation in deciding that as regards the Rooney Terrace property, the purchase was made with the full concurrence of the plaintiff while still a minor, that this purchase and the expenditure of the moneys advanced by the Bank from the deposit receipt fund was ratified by the plaintiff after he attained age.

The other subsequent transfers to current account made on 7th January, 1927, 10th October, 1927, 2nd October, 1928, and 19th July, 1929, were made, as I have said, with plaintiff's full consent, acquiescence, and with his authority. It follows, therefore, that the defence succeeds so far as these payments are concerned.

The sums of £170 and £257 12*s.* 10*d.* stand on a somewhat different footing. They were made before the plaintiff had gone into the business and before he had attained age. He was no active party in these transactions between the Bank and the trustees. He cannot, however, in his dealings with the Bank and his knowledge of the transactions about the deposit receipt, have remained in total ignorance of the fact that the two sums were taken from the deposit receipt account and were employed in the business of which he was for a considerable time the prospective owner and manager. These moneys have enured as mentioned in the defence for his benefit. Perhaps it might be more accurately said that they were made available for him to squander. While I am of this opinion and while I strongly suspect that the plaintiff was acquainted with the legal position from the very first, and while I am convinced that he knew his full rights from the time that he became twenty-one, I do not see such active ratification of the two withdrawals in question as would prevent his taking advantage of

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the mistake of the Bank, and with very considerable doubt I decide that he shall succeed in recovering these two sums.

By his claim the plaintiff asks interest on the amount payable. If these sums had remained on deposit receipt, the current account would have been more overdrawn and more interest would consequently have been charged against it. I do not think that in the circumstances the Bank should be charged a higher rate of interest than the ordinary deposit receipt interest. No doubt the money was used in trade, but in a trade where it was in reality under the control of the plaintiff himself.

I therefore find that the plaintiff should be held entitled to the sum of £427 12*s.* 10*d.* with interest at deposit rates, *i.e.*, £514 4*s.* 4*d.* As on the 10th of June, 1931, the sum of £594 11*s.* 2*d.* was lodged in Court, more than enough to satisfy the amount found due.

The defendants are therefore entitled to judgment with costs after the date of the defence.

The plaintiff appealed to the Court of Appeal.

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Feb., 8, 13, 15, 16, 20.

McGonigal, K.C., *Murphy, K.C.*, and *Copeland* for the appellant:—

In order to bind the plaintiff by his acquiescence the defendants must shew that he gave a consent with full knowledge not only of the facts but of his legal rights, *Brittlebank v. Goodwin* (1). In *Marker v. Marker* (2), Turner, V.C., said at page 16, "Parties cannot, I "think, be said to acquiesce in the claims of others "unless they are fully cognisant of their rights to "dispute them." [They also referred to *Farrant v. Blanchford* (3), and *In re Garnett, Gandy v. Macaulay* (4).]

The trustees, through whom the Bank claims, had no power to employ the £10,000 in the businesses and in so doing committed a breach of trust, *M'Neillie v. Acton* (5).

(1) L.R. 5 Eq. 545, 550.
(2) 9 Hare 1, 16.
(3) 1 De G. J. & S. 107.
(4) 31 Ch. D. 1.
(5) 4 De G. M. & G. 744.

It was the unwarranted action of the defendants in transferring the £10,000 from the name of the plaintiff into the names of the trustees that enabled the latter to commit the breaches of trust.

The lodgment of the £10,000 in the joint names of the deceased and the plaintiff was an advancement to the plaintiff, *Childers v. Childers* (1), and accordingly it never became part of the deceased's estate. The presumption of an advancement may not be rebutted by evidence that it was made in furtherance of a fraudulent purpose, *Gascoigne v. Gascoigne* (2).

This Court is not bound to accept the finding of the Judge at the trial, as to the relative credibility of witnesses. Circumstances may warrant the Court differing from the trial judge even on a question of fact turning on the credibility of witnesses whom the Court has not seen. *Coughlin v. Cumberland* (3). An Appellate Court has a right to draw its own inferences of fact, *Cooper v. General Accident Assurance Corporation* (4).

Lowry, K.C.; Black, K.C., and *MacDermott* for the respondents:—

On the facts as found by Megaw, J., the lodgment of the £10,000 in the joint names of John McEvoy and the plaintiff did not amount to an advancement of the plaintiff. The £10,000 still remained the property of John McEvoy and after his death formed part of his estate.

If, however, the £10,000 became, on John McEvoy's death the property of the plaintiff the relationship between the Bank and the plaintiff was simply that of debtor and creditor, *Foley v. Hill* (5). So far as regards the portion which was applied in the purchase of Rooney's Terrace the plaintiff after attaining full age ratified that transaction and has recently sold Rooney's Terrace at a profit and has received the purchase money. His present claim is in effect to

(1) 3 K. & J. 310.
(2) [1918] 1 K.B. 223.
(3) [1898] 1 Ch. 704.
(4) [1922] 2 I.R. 38, 56.
(5) 2 H.L.C. 39.

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receive twice over the money invested in Rooney's Terrace.

As regards the balance of the £10,000 the evidence establishes that all the dealings with it took place with the consent of the plaintiff and a considerable portion of it can be traced into the plaintiff's own pocket.

The plaintiff knew all the material facts regarding the matter and accordingly is not now entitled to recover from the Bank.

Whether he was aware of his legal rights is irrelevant as an action such as the present cannot be maintained on a mere mistake of law where the plaintiff was fully aware of the material facts, *Rogers v. Ingham* (1).

Even if he was under any mistake as to his legal rights the whole tenor of his evidence is that he was not influenced by such mistake, *Home and Colonial Insurance Co., Ltd. v. London Guarantee and Accident Co.* (2). Moreover, Megaw, J., has found on ample evidence that the plaintiff was fully aware of the legal position. *Cur. adv. vult.*

Sir William Moore, L.C.J.

Feb., 24.

Moore, L.C.J.: I am so much in agreement with the inferences of fact drawn and the propositions of law stated by Mr. Justice Megaw in his admirable judgment in this case that I think it would be wrong to indulge in unnecessary recapitulation, and I therefore merely desire to add a few observations of my own. First, as to the form of action, as to which there was some comment during the hearing of Appeal. The law is well settled since *Foley v. Hill* (3), that the relation of customer and banker is that of creditor and debtor; and if in the present case on the facts which have been proved, the executors of James McEvoy's will were to sue the Bank for the sum of £10,000, or whatever may be due in this action, the claim would be a common law one and the simple defence would be that the moneys had been paid. But here, however, plaintiff was not a customer of the Bank except technically for a very few weeks when the Bank determined

(1) 3 Ch.D. 351.
(2) 45 T.L.R. 134.
(3) 2 H.L. 28.

that relationship in so far as it was ever in existence by reason of the plaintiff being the survivor in a deposit receipt account. The plaintiff as beneficiary under his father's will could bring an action in the Chancery Division against the trustees and executors for misapplication of his father's estate, and if he chose he could make the Bank defendants in that action and obtain relief provided he could prove that with due knowledge and notice of his own rights they were "implicated" and deliberately assisting in the commission of any breach of trust by the trustees in the management of the estate.

The present suit is one in which plaintiff has not thought fit to join the trustees, and the Bank as sole defendant has not thought fit to bring them in under the third party procedure, apparently for the same reason that they are not worth powder and shot, and for this reason the action proceeds against the Bank alone. For though the statement of claim is very reticent so far as allegations of the existence of a trust are concerned, this is the objective of the whole trend of the evidence and the case made by the plaintiff. I think, therefore, subject to the necessary proofs, that the action has been rightly brought in the Chancery Side of the Court.

With regard to the capital sum involved of £10,000 I would like to point out that the plaintiff was either entitled (*a*) to the whole sum under the doctrine of advancement in which case it ceased to form part of his father's estate, or (*b*) including it in his father's estate he would be entitled to so much of it as would legitimately be in existence once he attained the age of 25 years by virtue of the provision in his father's will.

The leading case that is always quoted in the Irish Courts since I have been called to the Bar is that of *Talbot v. Cody* (1), with the luminous judgment of the then Master of the Rolls, Sir Edward Sullivan.

In my opinion the transaction in this case, so far as the deposit receipt is concerned, was an attempt to defraud the revenue, and, when the Court enquires

(1) 10 I.R.Eq. 138

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into this afterwards, more than sufficient evidence is forthcoming to rebut any presumption of advancement from father to son. In my opinion it is clear that the plaintiff took no beneficial interest in this money by way of advancement outside his father's estate. But he was the survivor of his father and himself on the deposit receipt representing moneys lodged with the Bank and as such had a possessory right as between himself and the Bank. The Bank behaved in a most extraordinary way in the matter. They ignored the principle of *Talbot v. Cody* (1), they assumed the right at their own will to wipe out the plaintiff's interest in the money by a stroke of the pen, they reversed the decision in *Gascoigne v. Gascoigne* (2), by replacing in the testator's estate moneys which no Court of Equity would assist him to recover. But it was a terrible risk for the Bank to take and in my judgment wholly unjustifiable, and had it not been for the defence of acquiescence in the subsequent dealings in which the plaintiff is personally involved, I would grant the plaintiff the relief he seeks with costs.

As therefore this £10,000 was in fact handed over to the trustees of the testator's testamentary estate, it falls to be dealt with under his will. There is no dispute as to the effect of the contents of the will; debts and legacies were to be paid; the publican's business was to be carried on, the plaintiff to be maintained, and the residue was to become his own when he attained the age of 25. This, however, would not happen until the year 1930. Should he die in the meantime, he had no disposing power as the testator had provided for distribution of the fund under his own will. It is plain on the evidence that the Bank treated this young man throughout as the virtual owner of the business. I need not refer to the precise words; they will be found in the learned Judge's note. And here again they were taking a risk in treating the plaintiff as owner of the business from his twenty-first birthday in 1926, because if he had died between his legal coming of age and his testamentary coming of age—four years later—the Bank might have had

(1) 10 I.R.Eq. 138. (2) [1918] 1 K.B. 223.

considerable difficulty in arranging matters with those entitled in remainder. However, they were favoured by fortune, and he attained his testamentary full age.

In the opening sentences of this judgment I refer to the necessity of the plaintiff proving that the Bank had notice of all his rights under the will of his father. In spite of Mr. Coleman's statement that he never read the will and his assumed ignorance of its contents, I am quite satisfied that the Bank knew all about the financial position of the plaintiff. Had they not done so they would not have treated him as owner, and if the matter had stopped there I would have been prepared to hold that the Bank along with the trustees were liable for whatever breaches of trust were proved. But I am also satisfied, contrary to the plaintiff's own description that he was a mere message boy, that he was fully alive to his legal position including his rights under his father's will, and in the case of every reduction of the moneys held by the Bank for the trustees he gave a willing assent just as he did to the application of such moneys in defraying the debts of the business in which he was so vitally interested.

I have said I desire to avoid recapitulation, and therefore I content myself merely by saying that I should like to be allowed to adopt every word on these issues which fell from the learned Judge at first instance. I think acquiescence, so far as it was necessary, and ratification on the part of the plaintiff, were established beyond a doubt. I think the Appeal fails and should be dismissed with costs.

Before concluding I would wish to express my appreciation of the admirable manner in which the Appeal Books have been made up for the use of this Court. Clearly typed, indexed, and containing everything that is necessary, it has been a pleasure to work with them, and personally I would like to thank plaintiff's solicitors.

Andrews, L.J.: The material facts of this case are fully stated in the judgment of Megaw, J. I am satisfied upon the evidence that the sole object which the plaintiff's father, John McEvoy, had in view,

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when, on 20th July, 1921, he placed the sum of £10,000 on deposit receipt with the defendants in the joint names of himself and the plaintiff, was the avoidance of estate duty. He was very ill at the time, suffering from an internal disease, and it is apparent that he realised that his death was near at hand. His will, executed three weeks later, on 10th August, 1921, was under consideration at the time. The settlement of his affairs was not an easy task, as his property, including the three businesses of publican, grocer and undertaker, was reasonably substantial, and the natural object of his bounty was his only child—a motherless schoolboy, then under 16 years of age. He shared with many other good citizens a natural reluctance to hand over any of his life savings which he could avoid doing to the National Exchequer ; and he hoped, and possibly believed, that by the device of putting the sum of £10,000 into the joint names of himself and his son payable to either or the survivor, coupled with the ignorance or the elastic conscience of his executors, this substantial sum might escape the vigilant eye of the estate duty authorities. We are not concerned now with the temporary success which followed. Our only interest lies in the fact that the real motive—the real object—of the transaction was not the advancement of his son, who under his will would not become entitled to the corpus of his estate until he attained the age of 25 years, but the desire to avoid the payment of duty.

Now what is the legal effect of his action ? The principles underlying the conflicting doctrines of resulting trust and advancement are perhaps to be found most clearly stated in the notes to *Dyer v. Dyer* (1), in *White & Tudor's Leading Cases*, vol. II, 8th Edition, 820. In general, where property, whether real or personal, is taken in the names of the purchaser and others, or in the names of others without that of the purchaser, a trust results to the man who advances the purchase money. Such resulting trust, arising simply from equitable presumption, may, however, be rebutted by parol evidence. Thus, it has long been

(1) 2 Cox 92.

settled that a purchase by a father in the name of his child is a circumstance of evidence which displaces such equitable presumption, and raises a *primâ facie* case of advancement. So also a presumption of advancement may arise where a father alters a deposit receipt from his own name to the names of himself and his wife, *Talbot v. Cody* (1). Such circumstance is, however, only evidence of an intention, and may in turn be met with other evidence tending to show a contrary intention. Such evidence may, for example, show that the child or wife had been already fully advanced, or that the father retained possession of the property. But there are certain well defined limitations upon the class of evidence admissible to rebut the presumption of advancement, one of which is that the Court will not receive, or, at any rate, will not act upon evidence, the object of which is to show that the person who made the transfer intended it to take effect in fraud of the law or in contravention of public policy. This limitation has been frequently recognised in such cases as *Childers v. Childers* (2), *Cottington v. Fletcher* (3), *Muckleston v. Brown* (4), and in the comparatively recent case of *Gascoigne v. Gascoigne* (5), where a husband who was in debt took a lease in his wife's name with the object of protecting the property from his creditors. He was not permitted to rebut the presumption which the law raises by setting up his own illegality and fraud, or to obtain relief in equity because he had succeeded in proving his own dishonest act.

I, accordingly, agree entirely with Megaw, J., that, whilst it is clear upon the evidence that there was no intention on the part of John McEvoy to take this sum of £10,000 out of his estate and to make an advancement of it to his son, the Court cannot have any regard to the evidence which establishes this fact because of its illegal taint.

I have felt it right to make my views clear upon this point, which was properly raised for determination in

(1) 10 I.R.Eq. 138, 146.
(2) 3 K. & J. 310.
(3) 2 Atk. 156.
(4) 6 Ves. 52, 68.
(5) [1918] 1 K.B. 223.

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the action, yet, strictly speaking, is not in issue on this appeal, as the defendants, having succeeded, with the aid of the lodgment in Court, on the further plea of acquiescence, did not consider it necessary, or perhaps advisable, to raise the matter before us by the service of a cross-notice of appeal.

I now turn to the question of acquiescence. For the determination of this issue it is in my opinion in the first place necessary to consider what was the relation of the plaintiff and the defendants to one another upon the death of John McEvoy. In my opinion, *Foley v. Hill* (1), is a clear authority that it was the relation of creditor and debtor, not that of *cestui que* trust and trustee. In the performance of his ordinary duties—the receiving of money from his customer—a banker is not even, like an agent, a quasi-trustee. Money paid into a bank ceases altogether to be the money of the customer. It becomes the banker's money. He can deal with it as his own; he is guilty of no breach of trust in employing it; he is not answerable to his customer if he puts it into jeopardy; he is not bound to keep it or deal with it as the property of his customer, but he is of course answerable for the amount because he has contracted, having received that money, to repay to his customer when demanded a sum equivalent to that paid into his hands. This relationship of debtor and creditor exists, of course, as clearly in the case of a deposit as of a current account, *Pearce v. Creswick* (2). It was fully appreciated by the pleaders in the present action, who nowhere in the Statement of Claim allege anything in the nature of a breach of trust, but base their claim on an alleged wrongful payment of the £10,000 without the authority of the plaintiff to four named persons, who in fact were, though they were not referred to as such, the executors and trustees of John McEvoy's will. Alternatively, the sum is claimed as money had and received. In substance on the facts of this case there is no difference between the two counts; and the only Chancery flavour which the Statement of Claim contains is the prayer for a

(1) 2 H.L.C. 28. (2) 2 Hare 286.

declaration and for an account of interest due, both of which could, if necessary at all, have been obtained in the King's Bench Court, though more conveniently sought on the Chancery side.

Under these circumstances, it was somewhat remarkable to find that practically every authority cited on behalf of the plaintiff was a decision of the Chancery Courts, in which an issue of a breach of trust was involved.

Before proceeding further, however, with the legal aspect of this question, let us consider the facts. What material facts were within plaintiff's knowledge, and of what was he ignorant ? His evidence was not in my opinion characterised by excess of candour, yet certain facts he was bound to admit. He knew that the £10,000 which had been on deposit receipt in his father's name was transferred into the joint names of his father and himself, and he knew, a short time after his father's death, that it had been changed into the names of the trustees. He heard his father's will read after his death, and heard the discussion upon it which followed. In no part of his evidence does he suggest that he was unaware of the fact that under the will the residuary estate, including the businesses, was to be held by his trustees in trust for him until he attained the age of 25 years and then for him absolutely. All the facts established in reference to his connection with the business would negative any such suggestion ; and indeed in cross-examination by Mr. Lowry he admitted that he knew he would be "entitled to everything at 25." Actively engaged in the business from the moment he left school, though during part of the time he was assisted by a manager, he knew, as he admits, that the business account needed to be reinforced, and that some money should be transferred to shop current account. He knew that large sums were taken from deposit for this purpose. Indeed, he admits that he "got" the executors to endorse the deposit receipt on several occasions for this purpose, and knew it would soon be gone. Ledger entries of such withdrawals from deposit and of lodgments to business account were

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made in his own handwriting. In his conduct of the business he frequently filled up cheques which had been signed in blank—20 or 30 at a time—by the executors. He admits that he may have done this even before 1925. Sometimes, on the other hand, cheques would be filled up by the managers. The last manager was McParland, who was dismissed on plaintiff's report in August, 1929, after which the plaintiff carried on the business himself. He received no salary; he just took what he liked. He would take money out of the drawer and the trustees and executors never interfered with his cash drawings. Sometimes also—he suggests on only three or four occasions—he drew cheques for his drawings. One of the cheques which he so drew was for £150 in favour of himself personally on the eve of his marriage. There is also an unexplained cheque, dated 2nd September, 1929, for £20 in favour of his wife. As illustrative of his financial methods and his independence of the trustees, the Petty Cash Book for the month of February, 1928, shows twelve payments to or withdrawals by the plaintiff, amounting to £9 0*s.* 6*d.* Obviously, however, all that was taken by plaintiff out of the business was not entered. This applies to both cash and stock, in respect of which, as plaintiff admits, his accountants, Sheeran, Carton & Company, reported "serious leakages." Indeed, their report, covering a period of two and a quarter years—from 1st February, 1928, to 30th April, 1930—shows a sum of almost £2,000 unaccounted for, including cash sales omitted in the grocery business amounting to £1,389, and similar sales in the Bar amounting to £60. Perhaps a still more startling item in the report is "Private Entertainment, etc., in Bar £250. No records kept." Such an item helps to explain the intemperate habits which plaintiff admitted he acquired; for, in answer to Mr. Lowry, he said that "when Kinney was nursing me it was because of "drink—six days."

The importance of the part which plaintiff was playing in the business which was to become his absolute property at 25, was also clearly established by his principal witness, Mr. John Thompson, the

manager of the Newry office of Messrs. Atkinson & Boyd, who from time to time prepared the accounts and made the audits of the businesses. "They "looked," he said, "to Joseph McEvoy (the plaintiff) "for pricing stock. There was nobody but McEvoy "to price the stock. He was the brains of the place. "Apparently he was the man in control then (1925) ". . . . . McEvoy always made drawings for his "own purposes."

This is only part of the evidence which could be cited—the correspondence would be at least equally valuable—to show how grossly inaccurate was plaintiff's description of himself when he described his position in the business in the words, "I was only acting as a "messenger boy."

What is the plaintiff's case in support of his claim ? In a word it is this—that although he knew, as he must admit, all material facts, he did not know his legal rights until he was informed as to them by Mr. Fisher ; and that, ignorant of his rights, he cannot be bound by the doctrine of acquiescence. If the law be such we must give effect to it ; but in my opinion, on the facts of the present case, the result would be certainly an injustice, if not, indeed, a fraud.

It seems to me that in pressing this action against the Bank, whilst the claim against the trustees is allowed to remain in abeyance, the plaintiff is really seeking to visit responsibility for the alleged wrongful acts of the trustees on the Bank. This would rather appear from his evidence, in which he said that "he "blamed the executors for carrying on the business "as they did" ; and in his argument before us Mr. McGonigal contended that "even if the doctrine of "advancement was rebutted, that didn't entitle them "to put the money in the business ; it was a breach "of trust." The answer to this argument is that, so far as the Bank were concerned, there was no breach of trust, as the relation in which they stood to the plaintiff was, as I have shown, that of debtor and creditor, and not that of trustee and *cestui que* trust.

The first occasion upon which capital was withdrawn from the deposit moneys was on 1st May, 1925.

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The money was required for the purchase of Rooney's Terrace. Plaintiff, though still under age, took an active interest in the purchase which was regarded as in the nature of a good investment. He went with one of the trustees, Adamson, to see Coleman, the Bank manager. At the request of Mr. Boyle, of Messrs. Hunter Moore & Boyle, plaintiff took Adamson over to see the property. He says that he "saw that "this would be a good return." The purchase, effected by Deed of 4th May, 1925, was made in the names of the four trustees. The purchase money—£2,025—was obtained from the deposit moneys—the total withdrawal on 1st May, 1925, being £2,076, which doubtless included costs and expenses. That the purchase was made by the trustees as trustees there can be no doubt, both because of the source from which the purchase money came and also because of the subsequent history of the property; but quite properly the deed contained no reference to the fact that the moneys were affected by any trust, as it was desirable that this should be kept off the title. The plaintiff admits that he knew how much the property cost and where the money came from and that he approved of it. Adamson collected the rents until he became ill about January, 1928, and subsequently plaintiff collected them. From the beginning, however, Adamson handed over the rents as soon as he collected them to the plaintiff for lodgment, and they were in fact lodged to the credit of a No. 2 Account either by the plaintiff or the bookkeeper. The first lodgment docket—5th May, 1925—was admitted to be in plaintiff's handwriting. Transfers were made from time to time of credits from No. 2 to No. 1, the business account; and, eventually,No. 2 account was closed in 1930. The property was sold in 1931, and the established facts in connection with this sale are, in my opinion, of the utmost importance, especially as the plaintiff had then not only attained the age of 25 years but had received the independent advice of Mr. Fisher, who, according to his evidence, was the first person to apprise him of his rights in regard to the deposit moneys. In the conditions of sale the plaintiff

was referred to as "the vendor." Mr. Fisher's replies to the purchaser's requisitions, dated 7th July, 1931, disclosed that, though no trust had been declared, the trustees had bought in trust for the estate of John McEvoy, deceased, and that the plaintiff took the property over on attaining the age of 25 years, *i.e.*, on 14th November, 1930. The date is important in view of the fact that plaintiff tells us that he first went to Mr. Fisher and told him about the deposit in January, 1930, and that he had another interview with him "after 20th November, 1930," when he became aware of his rights as to the deposit receipt. I can draw no conclusion from the above facts other than this, that whatever irregularity may have existed in the original purchase, it was adopted and approved of by plaintiff after he had attained the age of 25 years and had full knowledge of his rights.

The completion of the sale and disposal of the purchase money clearly confirm this view. The conveyance of 6th November, 1931, to the purchaser recites that the purchase had been made out of monies forming part of the residuary estate of John McEvoy, and that upon the plaintiff attaining the age of 25 years, the trustees assented to him entering into receipt of the rents and profits of the premises as representing portion of the residuary estate. The deed contains the further important statement that the purchase money of £2,260 was paid by the purchaser to the plaintiff. Dealing with this in his oral testimony the plaintiff said that the property was sold on the instructions of the trustees to pay creditors; that he joined in the deed; and that Fisher was acting for him at that time.

The transaction assumes a still more important aspect when we remember that the writ of summons in this action was issued on 27th April, 1931, and that on 19th May, 1931, the statement of claim was delivered, in which the plaintiff claimed that he became entitled to the deposit receipt and moneys on the death of his father. It seems to me that no facts could more clearly establish than those which I have mentioned that the plaintiff, fully informed as to the

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facts and fully advised as to his rights, adopted and acquiesced in the action of the trustees in the investment of portion of the deposit moneys in the purchase of Rooney's Terrace; and, furthermore, that he recognised that the trading, though unsuccessful, had been carried on under the authority contained in the will in his supposed interests, and that the trustees, in whose names the debts of the business had been incurred, were entitled to be indemnified against personal loss by having these debts discharged. But the point that is so unintelligible to me is how it can be suggested that the Bank are now liable for this sum of £2,076 paid to the trustees to enable them to make this investment in the purchase of Rooney's Terrace which was subsequently adopted by the plaintiff. The money was not put into the business by the trustees; and plaintiff is estopped by the terms of his own deed from denying that when the substantially increased sum of £2,260 was realised, it was within his own control. If under these circumstances it was used to pay creditors, I am unable to see how plaintiff, in the absence of evidence of duress or fraud, could have any redress in respect of such payment against anyone. In particular, how could any liability exist on the part of the Bank? For, even if it be admitted that they were technically wrong in handing over these moneys to the trustees for an investment in their names approved by the plaintiff, such action on their part produced no loss, but on the contrary resulted in an appreciable gain. Their action was at most an *Injuria sine damno.*

It now becomes necessary to consider whether, in the circumstances to which I have referred, the plaintiff has any remedy against the Bank in respect of the deposit moneys which were transferred direct from the deposit into the current account of the business, and there utilised either to pay ordinary trade creditors or to liquidate the amount of the overdraft due to the Bank.

As regards the first two withdrawals of £170 and £257 12*s.* 10*d.*, which were made on 25th January, 1922, and 27th February, 1925, respectively, before

plaintiff attained the age of 21 years, I share the doubts of Megaw, J., in regard to ratification; and, as his decision in reference to them is not the subject of cross-appeal by the Bank, I am of opinion that they should be allowed to the plaintiff. I heard no argument which, in the special circumstances to which he refers, affected in any way the wise exercise of his discretion in regard to allowance of interest at deposit receipt rate only. It would be quite wrong to look only to the fact that the money was used in trade, and to ignore the fact that the business was in truth, in the events which have happened, the plaintiff's own business, and that if the overdraft had not been reduced, more interest would have been charged upon it.

As regards the remaining four withdrawals, made between 7th January, 1927, and 19th July, 1929, different considerations apply. Plaintiff was of age. He was an active moving party in effecting them. He knew where the money had originally come from —his father. He knew where it was then coming from—the deposit receipt; he knew where it was going to—the current account; he "got" the executors to endorse the deposit receipts, and he afterwards recorded the transactions in the ledger; he knew the object of the change; he knew from the attitude of the Bank manager, Coleman, that the Bank would not allow more extended credit, and that it was essential for the continuance of the business in which he had such a vital interest—both immediate and prospective—that the transfers from deposit to current account should be made. He knew that the Bank overdraft had been created largely by business cheques which he had himself filled up, and that to an appreciable extent it was attributable to his own personal drawings of cash, consumption of stock, and "private enter- "taining." The value or amount of the personal benefit so derived over the full period we do not know, but Mr. Thompson says that the plaintiff "was always making drawings for his own purposes." This, however, is clear that, in pressing the claim which he now makes against the Bank, no allowance

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is made in respect of same; and the Bank are now seriously asked by the plaintiff to make good (amongst others) the moneys and the value of the stock which he has personally received and dissipated. It would only be under the strongest compulsion of law that I would arrive at a finding which effected such a manifest injustice. More than once the plaintiff says in his evidence that until he went to Mr. Fisher he didn't know his rights. I am clearly of opinion that he knew more than he says, especially as he is slow in particularising the points upon which he was ignorant. He admits that he had an interview with Hunter Moore & Boyle about the deposit receipt, but he doesn't tell us what advice he received, and he admits that he was present at every meeting of the trustees in Boyle's office. Mr. McParland's evidence, if accepted, as it was by the learned Judge at the trial, indicates that plaintiff's knowledge of his rights was greater that he was prepared to admit. Further, it is not unimportant to note that in neither statement of claim nor reply does he allege ignorance or mistake. Mr. McGonigal contended, however, that the plaintiff didn't know that he was absolutely entitled to the deposit moneys under the doctrine of advancement, and that he was further unaware that the trustees had no right to put outside assets, and particularly the deposit moneys, into the business. Without expressing any finding on the matter, I shall assume that this is so. Does ignorance upon these points confer upon the plaintiff the right to undo all that he was actively instrumental in accomplishing? Is he entitled to say: "As I didn't know, and as, indeed, "none of us knew my full rights, I am in no way "bound by anything that was done, even though it "was done at my request or by my direction, in part "for my immediate personal benefit, and as to the "remainder to enable a business to be carried on in "which I was then actively engaged, to which I was "then contingently entitled, and to which I subse-"quently became absolutely entitled. You, the Bank, "must make good to me all this money which I have "lost through our common mistake; but I am not

"under any liability to recoup to you or give credit "for any moneys which, as a consequence of such "mistake, my business, or even I personally, received. "You must pay me over again, not only the moneys "lost in the business, but also the moneys which I "drew out of the business, the moneys which my wife "drew out of it, the £150 which I spent on my honey-"moon, and you must make good also the loss sustained "through my drinking and treating my friends to "the stock in the public house. All this you must "do for this reason— at the time I did these things I "did not know that the moneys which I withdrew "and which supplied the stock were absolutely my "own. I thought I was merely entitled to a life "interest in them with a contingent absolute interest "when I became 25 years of age."

In my opinion there are at least three answers to plaintiff's claim. In the first place, as regards money or money's worth actually received by the plaintiff, and applied by him for his own purposes in the manner which I have indicated, the plea of payment is established. Secondly, there is the plea of acquiescence. In regard to this I wish to say nothing which would detract in the slightest from the necessity for a trustee who relies upon the equitable plea of acquiescence establishing not only a complete knowledge of the facts and circumstances on the part of his *cestui que* trust, but also knowledge and appreciation of his rights. Acquiescence, which operates by way of estoppel, implies assent--and the assent must be to the breach of trust. But in the present case, as I have pointed out, the claim is made not against the trustees (as to whose legal position I say nothing, for they are not before the Court) but against the Bank, who, at most, received the payment in liquidation of the current account; and there is, in my opinion, sound principle underlying the authorities to which the editors of *White & Tudor's Leading Cases in Equity* refer when they say (8th Edit. Vol. II., p. 687):--"Where money was paid with knowledge "of facts but under a mistake of rights, it was con-"sidered inequitable to allow the claim of a person

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"who had 'stood by' and allowed the payment." In *Stafford v. Stafford* (1), payments made annually for 15 years with the acquiescence of the plaintiff for the benefit of the residuary legatees on the erroneous assumption that the income of a legacy to which she was entitled was liable to contribute to a loss occurring on the reinvestment of part of the estate, were held irrecoverable from the residuary legatees. As Turner, L.J., said:—"It would be most unjust now to give "her relief as against the residuary legatees." Again in *Rogers v. Ingham* (2), an executor, acting on the advice of counsel on the construction of a will, proposed to divide in certain proportions a fund between two legatees. One of the legatees, being dissatisfied, took the opinion of counsel, which agreed with the former opinion. The executor then divided and paid over the fund in accordance with the opinions. Two years later the dissatisfied legatee filed a bill against the executor and the other legatee, alleging that the will had been wrongly construed, and claiming repayment from the other legatee. It was held that the suit could not be maintained. In his judgment, James, L.J., points out the position in terms equally applicable to the present case. "When," he says, "a trustee by "the direction or with the authority of his *cestui que* "trust, pays money to a third person, no matter under "what claim of right or under what circumstances, "it is exactly the same as if the *cestui que* trust had "received the money from the trustee and had herself "paid it to that person. It is simply a question of "money paid by the lady or by the lady's direction, "out of money of hers which the trustee had in hand, "to a person who said that he had a claim to the "money. That being so, it is reduced, as it appears "to me, to be a mere action for money had and "received." Later on he adds:—"I have no doubt "that there are some cases which have been relied on "in which the Court has not adhered strictly to the "rule that a mistake in law is not always incapable "of being remedied in this Court; but relief has never "been given in the case of a simple money demand

(1) 1 De G. & J. 193. (2) 3 Ch. D. 351.

" by one person against another, there being between " those two persons no fiduciary relation whatever, " and no equity to supervene by reason of the conduct " of either of the parties." Mellish, L.J., after referring to the familiar rule of law that money paid with a full knowledge of all the facts, although it may be under a mistake of law on the part of both parties, cannot be recovered back, proceeds to say (at p. 357) :—" I think " there is no doubt that the rule at law is in itself an " equitable and just rule which is not interfered with " by Courts of Equity ; but, on the other hand, I " think that, no doubt, as was said by Turner, L.J. : " ' This Court has power (as I feel no doubt that it " ' has) to relieve against mistakes in law as well as " ' against mistakes in fact, *Stone v. Godfrey* (1),' " that is to say, if there is any equitable ground which " makes it, under the particular facts of the case, " inequitable that the party who received the money " should retain it." I shall only say no such equitable ground exists in the present case. On the contrary, it would in my opinion be grossly inequitable to order the Bank to pay to the plaintiff the moneys which he claims in this action—moneys from which both he and his business received benefit. When it is urged that the Bank also received benefit by the reduction or liquidation from time to time of the amount due on current account, it should be remembered that no such extended credit as was in fact given would have been given had the first transfer which was sought been declined, and at that time there would have been ample security, apart from the deposit moneys, to meet a judgment for the amount due to the Bank.

The third reason why in my opinion the plaintiff cannot recover is that, admitting that the plaintiff and all other interested parties were mistaken as to the plaintiff's rights, and assuming that the plaintiff has suffered loss by the withdrawals and gradual disappearance of the deposit moneys, yet the plaintiff has absolutely failed to establish to my satisfaction that the loss was the effect of or that it was directly

(1) 5 De G. M. & G. 90.

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consequential upon the mistake. There is not a suggestion throughout the whole of the plaintiff's evidence to support the view that, had plaintiff known that he was absolutely entitled to the deposit moneys, he would have acted differently from what he did when he thought, as he says, that his interest in them would only become absolute on his attaining 25 years of age. Why should his attitude in reference to the transfer of the deposit moneys to current account be affected by the precise nature of his interest in them ? The transfer was necessary, as the plaintiff knew, in order to permit of the continuance of the business in which he was at the time actively engaged, and in which he had such a vital interest, both immediate and prospective. The same necessity would have existed, and it would obviously have affected the plaintiff in just the same way, had he known all that Mr. Fisher ultimately advised him, or all that Megaw, J., has determined in reference to his rights in the deposit moneys. Any doubt which I might have had on this point is removed by a consideration of his conduct in reference to the proceeds of sale of Rooney's Terrace. As I have already pointed out, he received these moneys after he had obtained Mr. Fisher's advice; and, when, accordingly, under no legal compulsion to do so, he either utilised them or permitted them to be utilised for the payment of creditors or reduction of the Bank overdraft. Is it not the obvious inference to draw that, even if he had possessed the most complete knowledge of his rights, his action would have been precisely the same as it in fact was ? It was for the plaintiff to establish not only the mistake and the loss, but also that the latter was directly caused by the former. The onus of proving this causal relationship he has failed to discharge. The whole effect of the evidence is that, admitting he was under a mistake, the plaintiff was not influenced by it in making the decisions which he did. This point was very clearly made by Mr. Black. Mistake was, he said, just like negligence ; in the abstract it has no effect ; you cannot have actionable mistake, so to speak, in the air. He cited *Home & Colonial Insurance*

Co. v. London Guarantee and Accident Co. (1), as a recent authority for his proposition; and, though materially differing in its facts from the present case, it substantially supports the view. The principle for which Mr. Black contends is shortly expressed in *Halsbury's Laws of England*, Vol. 21, page 16, thus :— "In order that a mistake may be a ground for legal "remedy, the party who pleads it as a reason why "the ordinary consequences of his act should not "obtain must be able to show that his conduct has "been determined by the mistake." Several cases are cited in support of this view—a case in which the mistake was one of fact, *Carpmael v. Powis* (2), a case in which the mistake was one of law, *Stone v. Godfrey* (3), and one in which errors both as to matters of law and fact were alleged, *Trigge v. Lavallee* (4). It will suffice to refer to a passage in the judgment of Turner, L.J., in *Stone v. Godfrey* (3), where he said :— "The ground on which he (the plaintiff) founds his "title to this relief is, that in the year 1826 he was "erroneously advised that his equitable title could "not be maintained; and I assume that the advice so "given to him was erroneous, and that this Court has "power (as I feel no doubt that it has) to relieve "against mistakes in law as well as against mistakes "in fact. When, however, parties come to this "Court to be relieved against the consequences of "mistakes in law, it is I think the duty of the Court "to be satisfied that the conduct of the parties has "been determined by those mistakes; otherwise "great injustice may be done."

In the present case the plaintiff has completely failed to satisfy me that the conduct of the parties, and, in particular, his own conduct, was determined by a mistake as to his rights to or his interest in the deposit moneys; and I am clearly of opinion that to grant the plaintiff the relief which he seeks would work a great injustice to the defendants which this Court should not countenance. If relief against a mistake of law can only be granted on equitable grounds, it

(1) 45 T.L.R. 134.
(2) 10 Beav. 36, 43.
(3) 5 De G. M. & G. 90.
(4) 15 Moo. P.C.C. 270, 298.

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would be, indeed, strange if we were to exercise the jurisdiction in a case which would manifestly produce such an inequitable result.

In my opinion, the judgment of Megaw, J., was correct upon every point, and the appeal should be dismissed with costs.

Andrews, L.J.

Best, L.J.

Best, L.J.: Plaintiff's claim is for a declaration that he is entitled to the monies represented by a deposit receipt of the defendant Company, dated 20th July, 1921, for the sum of £10,000 in the names of his father, John McEvoy (since deceased), and of the plaintiff and payable to either of the named parties or the survivor, and to this claim the defence is twofold: (1) The defendants do not admit that the plaintiff ever was, or became, entitled to the said deposit receipt or to the monies represented thereby or any part thereof, and (2) they say that the said monies were transferred from time to time to a current account in connection with the business, belonging to the late John McEvoy, which the plaintiff was managing at the times of the transfers, and that such monies have come to his hands or have been applied at his direction, or, to use the language of Megaw, J., the second defence is that the plaintiff was a party to and ratified the dealings of the executors and trustees, and the action of the Bank in advancing the monies to meet the trading account of the business with which the plaintiff has been associated almost since his father's death has resulted in a situation that the monies on deposit receipt must be held to have been paid or applied by the defendants for the use of the plaintiff.

On the issue raised by paragraph 1 of the defence I agree with the learned Judge when he says: "that in "the circumstances the Court must leave the owner- "ship in the condition in which it was as between the "plaintiff and the estate at the death of John McEvoy. "The defendants can have no higher rights than the "executors. The Bank found themselves at John "McEvoy's death by their own contract the debtors "not to the trustees but to the plaintiff and the "defence raised by that paragraph fails."

It follows then that when John McEvoy died on 20th September, 1921, plaintiff was the owner of the monies represented by the deposit receipt.

It is admitted by Mr. Coleman, manager of the defendants' branch Bank at Newry, that the change of the £10,000 deposit receipt into the joint names of father and son on 20th July, 1921, was effected with the fraudulent purpose and in the hope of evading the payment of duty, and with this knowledge present to his mind and knowing that the schedule of assets of the deceased John McEvoy, in pursuance of that illegal purpose, contained no reference to the £10,000, Mr. Coleman proceeded on 25th January, 1922, without any intimation to the plaintiff to have the deposit receipt endorsed by John McEvoy's executors and to have a new deposit receipt for the same amount issued in their names. He thereby put it in the power of the executors and trustees of the will to deal with the deposit receipt as if it belonged to the estate of deceased and to commit the various breaches of trust alleged against them. Plaintiff at this time was just over 16 years of age, having been born on 14th November, 1905.

It appears repeatedly from the correspondence between Mr. Coleman and the Bank and from his evidence that in his view the £10,000 belonged to the estate, that the executors had a right to control it until plaintiff attained the age of 25 years and to make use of it in carrying on the deceased testator's business.

Plaintiff says that early in 1922 he asked Mr. Coleman why the deposit receipt was changed into the names of the trustees and received the answer that as he was a minor it would save compound interest if so changed. Mr. Coleman denies that this question was put to him and that he gave any such answer. He also denies that on another occasion, fixed by inference from plaintiff's evidence at the beginning of 1924, plaintiff asked why the deposit receipt was changed from his name and that he (Coleman) said it was changed under the will and belonged to the trustees until he, McEvoy, should attain the age of 25 years.

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I think it quite likely that some such question may have been put and if it were put I cannot see how Coleman, having regard to his views on the matter, could have answered it in any other way than that sworn to by plaintiff. The answer appears to tally exactly with those views.

Testator's business was carried on by Alice Kinney in accordance with directions contained in the will and under the control of the executors. After her marriage at Easter, 1925, it was carried on as before under their supervision by a manager called Murden, and then by another called McParland, and finally by the plaintiff himself who had left school in 1923 and had begun to help in the business and was consulted from time to time by the trustees, and it was about eight months after leaving school that he says inquiry was made for the second time from Mr. Coleman as to the reason for the change in the deposit receipt.

If there be one thing clear in this case it is that all the parties to the dealings with the deposit receipt—Coleman, the Bank, the trustees, and the plaintiff—held the view that the monies represented by it belonged to John McEvoy's estate and that it did not belong to plaintiff. Even if this view had been correct it was in my opinion a breach of trust on the part of the trustees to allow, without express authority from their testator, a sum of money which was independent of the business to be used for carrying it on, *McNellie v. Acton* (1).

The trustees were guilty of a breach of trust in dealing as they did with the £10,000, and it was owing to the unwarranted action of the defendants in transferring the money into the names of the trustees that the latter were empowered to commit the said breach, and as they were urged thereto from time to time by the defendants with the object of reducing the overdraft on the business account the defendants can, in my opinion, be in no better position as regards this money than the trustees through whom they claim to have paid it for the use of plaintiff. The breaches

(1) 4 De G. M. & G. 744.

of trust were only made possible by the wrongful action of the defendants and their manager. Defendants seek to acquit themselves of liability by the plea that when plaintiff came of age he ratified what had been done up to that point and that subsequently he acquiesced in every transaction relating to the deposited money. As early as 1925 defendants were alive to the necessity of having these transactions ratified by plaintiff. This appears from the correspondence between Mr. Coleman and the Head Office and from his account of how the so-called letter of ratification of 14th April, 1927, came to be written. It is unnecessary to incorporate here the terms of that letter but it is clear that from beginning to end of it there is not a word to suggest that plaintiff knew what his rights were, that he knew, as the learned Judge has decided, that having attained age he could have brought an action against the Bank in which he would have succeeded in recovering the sum of £10,000 with interest thereon.

Having attained age plaintiff was in a position to ratify what had been done if knowledge of his rights with a corresponding full appreciation of the wrongful acts of the trustees and of the defendants had been brought home to him. Before he could be bound by the letter he should have been informed by the trustees or by the Bank that in reality they were operating with monies which, in law, were his own property, and that instead of using those monies in the administration of his father's estate and to finance a business which he might not live to own he was in a position to have them transferred to him at once. I cannot find ratification in a letter written by a young man who has just attained his majority a few months before the letter is written, who is without any independent advice in the matter and who is under the mistaken notion that he is not the owner of property which in reality is his.

As regards the transactions entered into after plaintiff had attained age, the defence is that he fully acquiesced in them. Nowhere in Mr. Coleman's evidence, nor from any other part of the case, does it

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appear with the exception to be mentioned hereafter in regard to the Rooney's Terrace property, that plaintiff was in full possession of the knowledge of his rights or that he acted with such knowledge. Mr. Coleman himself, as already mentioned, did not possess such knowledge. The learned Judge in his judgment says that from beginning to end he doesn't see a trace of evidence of concealment by the trustees from the plaintiff of his rights or any deception on their part. In my opinion this is not sufficient to relieve the trustees and through them the Bank from responsibility. The duty of proving an effectual discharge would lie on the trustees if they were defendants and the burden cast upon them in such a case is stated very clearly by Lord Chancellor Westbury, at p. 109 in *Farrant v. Blanchford* (1). They must show that the release was given by the *cestui que* trust deliberately and advisedly with full knowledge of all the circumstances and of his own rights and claims against them. The defendants do not stand to the plaintiff in the relation of banker to customer and cannot therefore avail themselves of the defences applicable to such a relation. In my view of the case the transfers from deposit to current account were induced by the defendants in their own interest and for their own purposes and were made possible only by their action in changing the £10,000 into the names of the trustees and if this be so they cannot, I think, rely upon any defence except such as would have been open to the trustees if they had been sued in the action. Further, if all the parties were acting under a common mistake as to plaintiff's rights—and of this there can be no doubt—plaintiff cannot be held to have acquiesced and it is unnecessary as a condition of his right to succeed that the trustees or the defendants should have acted fraudulently. *In re Garnett, Gandy v. Macauley* (2).

Plaintiff's evidence is that he only learned what his rights were after consulting Messrs. Fisher in November, 1930. The learned Judge rejects this evidence, and his judgment proceeds on the basis that the transfers

(1) 1 De G. J. & S. 107. (2) 31 Ch. D. 1.

to current account were made out of monies to which plaintiff was entitled and were made at his instigation and with his full consent and authority when he was a free and informed agent. That plaintiff was an *informed* agent is a matter of inference from the facts proved but is itself nowhere proved. I think it is an inference that ought not to be drawn and that the evidence taken as a whole is inconsistent with it. This brings me to a short consideration of the exception already mentioned. To purchase Rooney's Terrace property in 1925 the sum of £2,076 was taken from deposit account. Having regard to his state of knowledge at the time I do not think that plaintiff ratified this transaction by his letter of 14th April, 1927, but when he executed the deed of 6th November, 1931, he was in full possession of knowledge of his rights and he must be held bound by being a party to the deed and by his acknowledgment of the receipt of the purchase money.

The result is that in my opinion there should be judgment for the plaintiff for the amount claimed, less the sum advanced for the purchase of the Rooney's Terrace property, with appropriate interest thereon and that he should have the costs of the action and of this appeal.

Solicitors for the plaintiff: *Fisher & Fisher.*
Solicitors for the defendants: *O'Hare & O'Hagan.*

J.R.

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July, 10, 31.

REX (MEEHAN) v. CHAIRMAN AND JUSTICES OF COUNTY TYRONE (1).

Customs—Evasion of Duty—Election as to Penalty—When to be made—Amendment of Conviction—"Defect"—"At any time"—Excise Management Act, 1827 (7 *& 8 Geo.* 4, *c.* 53) *section* 71—*Customs* (*Consolidation*) *Act*, 1876 (39 *& 40 Vict.*, *c.* 36) *sections* 186, 223, 243—*Criminal Justice Administration Act*, 1914 (4 *& 5 Geo.* 5, *c.* 58) *sections* 16 (1), 43—*English Quarter Sessions Act*, 1849 (12 *& 13 Vict.*, *c.* 45) *section* 7.

A summons charged the defendant "that he . . . was "concerned in carrying, to evade the payment of duty thereon "certain uncustomed eggs . . . contrary to section 186 of the "Customs (Consolidation) Act, 1876, whereby the said defendant "has forfeited the penalty of £100 for which the Commissioners "have elected to sue." The defendant was convicted and the justices ordered him "to pay the sum of £10 11s. 0d. being three "times the value including the duty thereon of sixty dozen of eggs "which we adjudge the defendant to be carrying to evade payment "of the duties thereon . . . and for costs the sum of £1 14s. 6d. "within one month and if said sums be not paid within one month, "we adjudge Patrick Meehan to be imprisoned in Londonderry "Gaol for fourteen days with hard labour unless said sums be "sooner paid."

On a motion to make absolute a conditional order of certiorari which brought up the order of the justices for the purpose of being quashed.

Held, by the King's Bench Division (Best. L.J., and Megaw, J.):

(1) That it was open to the Commissioners at any time prior to conviction to say for what penalty they intended to sue.

(2) That the addition of the punishment of something not warranted in law was not a "defect" within section 223 of the Act of 1876, but made the order wholly bad.

(3) That the order could not be sent back to the justices to be amended after certiorari proceedings had been taken.

(4) That if it was not competent for the justices to amend the order the Court had no power, either to direct or request them to do so.

CERTIORARI: At a Court of petty sessions, held at Castlederg, County Tyrone, on 5th November, 1932, a complaint having been made by George Cowie, Officer

(1) In the King's Bench Division before Best, L.J. and Megaw, J.

of Customs and Excise, complainant, against Patrick Meehan, Garvagh, defendant, that on 9th September, 1932, at Garvagh, County Tyrone, the said defendant was concerned in carrying, to evade the payment of the duties thereon, certain uncustomed eggs, to wit 102 dozen eggs, contrary to section 186 of the Customs (Consolidation) Act, 1876, whereby he, the said defendant, has forfeited the penalty of one hundred pounds for which the Commissioners have elected to sue, the justices convicted the said Patrick Meehan for being " concerned in carrying, to evade the payment " of the duties due thereon, certain uncustomed eggs, " to wit 102 dozen eggs, contrary to 39 & 40 Vict., " c. 36, section 186," and adjudged " the said Patrick " Meehan to pay the sum of ten pounds eleven shillings " and one penny, being three times the value including " the duty thereon of sixty dozen eggs, these being " portion of the one hundred and two dozen which " he was charged with carrying, and for costs the sum " of one pound fourteen shillings and six pence within " one month, and if said sums be not paid within one " month we adjudge Patrick Meehan to be imprisoned " in Londonderry Gaol for fourteen days with hard " labour unless said sums be sooner paid."

On 24th January, 1933, the prosecutor (the defendant) obtained a conditional order for a writ of certiorari to quash the conviction on the following grounds :—

(1) that the money penalty is not the penalty for which His Majesty's Commissioners as set forth in the summons elected to sue.

(2) that the said order directs that for default of payment of the money penalty actually ordered to be paid together with the costs ordered the prosecutor Patrick Meehan should be imprisoned for fourteen days with hard labour.

Cooke for the prosecutor :—

The penalties provided by section 186 of the Customs (Consolidation) Act, 1876, are alternative remedies. Section 223 of the Act of 1876 provides that all informations exhibited before any justice for any offence

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committed against or forfeiture incurred under that Act may be in the form of Schedule C to the Act. The form of the information in Schedule C clearly contemplates the alternative remedies being exercised singly. In *Attorney-General v. Percy* (1), it was held that the power of election must be exercised by the Commissioners of Customs and Excise under section 186 of the Act of 1876.

On the true construction of section 71 of the Excise Management Act, 1827, where there is an election to sue for alternative statutory penalties, the election when made must be adhered to and the alternative remedy cannot be applied.

The insertion of the words "with hard labour" makes the order of the justices bad as contravening section 16 (1) of the Criminal Justice Administration Act, 1919, made applicable to Ireland by section 43 of the same Act, which enacts that "where imprison-" ment is imposed by any Court in respect of the non-" payment of any sum adjudged by that or any other " Court to be paid, the imprisonment shall be without " hard labour."

Power to amend, given by section 243 of the Act of 1876 refers only to mistakes or omissions in drawing up the order and not to matters of substance. [He referred to the judgment of Cockburn, C.J., in *Queen v. Padbury* (2).] Where the adjudication is wrong in point of substance the order cannot be amended, *Queen v. Tomlinson* (3).

The Attorney-General (*A. B. Babington, K.C., M.P.*), *Begley, K.C.*, and *J. G. Dougherty* for the respondents:

It is open to the Commissioners at any time before conviction to elect for what penalty they intend to sue. It is not necessary to give jurisdiction to the justices under the Act of 1876 that the Commissioners should make an election, nor is it a necessary part of the information or summons.

This was a first offence within section 12 of the Customs and Inland Revenue Act, 1879, which is

(1) [1929] I.R. 514.
(2) 5 Q.B.D. 126, 128.
(3) L.R. 8 Q.B. 129.

substituted for section 237 of the Customs Consolidation Act, 1876, and admittedly the insertion of the words "with hard labour" makes the order of the justices bad, unless it can be amended. By section 223 of the Act of 1876 no conviction shall be held void by reason of any defect therein. The insertion of words "with hard labour" is a "defect" within the meaning of this section.

Section 243 gives the justices power to amend any conviction under the Acts at any time, whether before or after conviction.

Under sections 223 and 243 this Court has power to send the case back to the justices to amend the conviction by striking out the words "with hard "labour." *Cur. adv. vult.*

BEST, L.J., delivered the judgment of the Court.

This matter comes before the Court on an application by the prosecutor that the conditional order for a writ of certiorari, dated the 24th day of January, 1933, may be made absolute notwithstanding the cause shown and for the costs of and incidental to the proceedings.

A complaint having been made by George Cowie, Officer of Customs and Excise, complainant, against Patrick Meehan, of Garvagh, defendant, that on the 9th day of September, 1932, at Garvagh, County Tyrone, the said defendant was concerned in carrying, to evade the payment of the duties due thereon, certain uncustomed eggs, to wit, 102 dozen eggs, contrary to section 186 of the Customs (Consolidation) Act, 1876, whereby he, the said defendant, has forfeited the penalty of One hundred pounds for which the Commissioners have elected to sue, an order was made on the 5th day of November, 1932, by justices present against the said Patrick Meehan to the following effect, viz.: Be it remembered that on 5th November, 1932, at Castlederg Petty Sessions, County Tyrone, Patrick Meehan is convicted before us, Justices of the Peace for County Tyrone, for that he the said Patrick Meehan within three years last past, to wit, on 9th September, 1932, at Garvagh, County Tyrone, was concerned in

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carrying, to evade the payment of the duties due thereon, certain uncustomed eggs, to wit, 102 dozen eggs, contrary to 39 & 40 Vict., c. 36, section 186. We adjudge the said Patrick Meehan to pay the sum of Ten pounds eleven shillings and one penny being three times the value including the duty thereon of sixty dozen of eggs which we adjudge defendant Patrick Meehan to be carrying to evade payment of the duties due thereon these being portion of the 102 dozen which he was charged with carrying and for costs the sum of One pound fourteen shillings and six pence within one month and if said sums be not paid within one month we adjudge Patrick Meehan to be imprisoned in Londonderry gaol for fourteen days with hard labour unless said sums be sooner paid.

The order of the justices is challenged as being bad in law on two grounds—(1) that the money penalty imposed by said order is not the penalty for which His Majesty's Commissioners as set forth in the summons elected to sue and (2) that the said order directs that for default of payment of the money penalty actually ordered to be paid together with the costs ordered the prosecutor (Meehan) should be imprisoned for fourteen days "with hard labour."

In support of the first point Mr. Cooke relies on the provisions of section 71 of 7 & 8 Geo. IV, c. 53, the Excise Management Act of 1827. The material part of the section is that where in any information for the recovery of any penalty any allegation or averment shall be made that the Commissioners of Excise or Customs made their election as in such information shall be alleged or averred, such allegation and averment shall be and the same respectively shall be deemed and taken to be sufficient proof of such facts so alleged or averred respectively without any further or other evidence thereof.

Mr. Cooke submits that on the true construction of the section the choice or election of the Commissioners must be made at the commencement of the proceedings and that as the Commissioners by their summons had elected to sue for the penalty of One hundred pounds it was not open to the justices on

proceeding to convict to impose any other penalty than that for which the Commissioners had already elected to sue. We do not think the section can bear the construction put upon it by Mr. Cooke. The section means no more than it plainly says which is that an allegation or averment in the summons that an election has been made shall be taken as proof of such election without any further or other evidence thereof. The section does not say and does not mean that if the Commissioners in the summons have made an election they are thereby debarred from changing their mind and from asking during the course of the hearing for the infliction of a penalty other than that which they had expressed their intention of suing for. It is not an essential part of the information or summons under the Act of 1876 nor is it necessary to give jurisdiction to the justices that the Commissioners should make an election as to the penalty sued for, and it is in our opinion open to the Commissioners at any time prior to conviction to say for what penalty they intend to sue though the Court should have information on the point at as early a stage as possible. The section relied on by Mr. Cooke had for its purpose to facilitate proof of the matters with which it deals and as was pointed out by Mathew, J., in *Dyer v. Tulley* (1), the section in question, section 71 of 7 & 8 Geo. IV, c. 53, and sections 21 and 24 of the Inland Revenue Regulation Act, 1890 (53 & 54 Vict., c. 21) were intended to provide for the more easy conduct of cases of this description. Accordingly, in our opinion, the first ground stated in the conditional order fails.

The second ground on which the conviction is challenged is that imprisonment with hard labour is ordered in default of payment of the sums ordered to be paid. Section 16, sub-section (1) of the Criminal Justice Administration Act, 1914, which by section 43, sub-section (1) of the Act is made applicable to Ireland, provides that "where imprisonment is imposed by "any Court in respect of the non-payment of any sum "adjudged by that or any other Court to be paid the

(1) [1894] 2 Q.B. 794, 797.

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"imprisonment shall be without hard labour." It is admitted by Mr. Begley that the order, unless it can be amended, is bad. Mr. Begley's submission is that by virtue of sections 223 and 243 of the Act of 1876 it is within the power of this Court to send the case back to the justices with a direction to them to amend the conviction by striking the words "with hard labour" out of their order.

The material part of section 223 is as follows:— "And no conviction, warrant of commitment, or "condemnation shall be held void by reason of any "defect therein"; section 243 provides that "any "justice shall and may amend any information, con- "viction, or warrant of commitment for any offence "under such Acts at any time, whether before or after "conviction."

Mr. Begley's argument is that the insertion of the words "with hard labour" in the conviction is no more than a defect and that under section 223 a conviction is not to be held void by reason of any defect therein. We are unable to take the view that the addition to the punishment of something not warranted in law is a "defect" within the meaning of the section; rather it is an addition to the punishment which makes the order wholly bad.

Mr. Begley further says that as it is open to the justices at any time under section 243 to amend any conviction for an offence under the Acts we ought to send the case back to the justices to amend the conviction by striking out the words "with hard "labour."

We were not referred by Counsel on either side to any case in which the meaning of the words "at any "time" in section 243 has been considered but in *O'Connor's Justice of the Peace* in the notes on the section two cases are referred to. They are *Exparte Auston* (1) and *Exparte Kenyon* (2). In the first of these cases the head note is that when justices have convicted for an offence unknown to the law, and have returned the conviction to the Clerk of the Peace, the Court will allow a rule for a certiorari to

(1) 44 L.T. 102. (2) 45 J.P. 303.

go notwithstanding that the justices in showing cause against such rule return a corrected record of the conviction showing such conviction to have been properly made. The word "knowingly" which was an essential ingredient was omitted from the conviction and a fresh conviction was drawn up and included in the return to the writ, but this was held to be late.

In *Exparte Kenyon* (1), Coleridge, C.J., says that hitherto it has always been allowed to justices to substitute an amended conviction for a defective one whether rightly or wrongly until the filing of the conviction. On principle and on the analogy of these cases we entertain no doubt that it is too late for the justices to amend the conviction once it has been challenged by the service upon them of the conditional order for certiorari.

In this connection the case of *The King* (*Burke*) *v. The Justices of County Cork* (2) may usefully be looked at. A publican was charged with an offence under the Licensing Acts and being convicted, the order made and entered in the book on the day of the hearing was:—"Defendant convicted and fined 40*s.* 0*d.* and "costs 1*s.* 0*d.*, to be recorded on his licence. In "default of payment one month's imprisonment in "Cork Gaol." Some days subsequently to the hearing two of the magistrates who had adjudicated, with the concurrence of the third who was not then present, amended the order in the book by adding the words "without hard labour" and "unless said sums be "sooner paid." The conviction in its original form was admittedly bad. It was held that under the circumstances there was no jurisdiction to amend the conviction.

In the present case the justices are permitted by section 243 to amend the conviction "at any time" but some reasonable construction must be placed upon these words and it would not be reasonable, in our opinion, to hold that it is open to the justices to amend an order which is bad after a determination by the court in certiorari proceedings that the order is bad. If it is not competent for the justices to amend

(1) 45 J.P. 303. (2) [1905] 2 I.R. 309.

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REX (MEEHAN) v. CHAIRMAN AND JUSTICES OF COUNTY TYRONE.

BEST, L.J.

the order there is no power in this Court either to direct them or request them to do so.

The conditional order of certiorari should therefore, we think, be made absolute notwithstanding the cause shown.

Solicitor for the prosecutor: *Thomas Elliot.*

Solicitor for the respondents: *Martin H. Turnbull & Co.*

J. R.

GARBETT v. COOPER (1).

C.A. 1933.

Oct. 25.

(1933. No. 3002.)

Practice—Remittal to inferior Court—Action fit and proper to be prosecuted in superior Court—Conflict between medical affidavits as to injuries—Common Law Procedure (Ireland) Act, 1870 (33 & 34 Vict., c. 109) section 6—Appeal—Discretion of Court of first instance.

The plaintiff appealed from an order made by Moore, L.C.J., remitting an action for personal injuries and for damage to his horse and van sustained by having been knocked down by the defendant's motor lorry. The plaintiff, in his affidavit, described his injuries and set out his estimated loss of weekly earnings, medical expenses and the damage to his horse, van and harness.

The defendant, in his affidavit, denied that he was guilty of negligence, stated that the plaintiff himself did not appear to have received any injuries whatever, and that the damage to his property was trifling.

Conflicting medical affidavits were sworn on behalf of the plaintiff and defendant.

Held, by the Court of Appeal (Andrews and Best, L.JJ.), that the action ought to be retained in the Superior Courts, as the plaintiff's affidavit and especially the medical affidavits sworn on his behalf, had disclosed injuries and loss for which a jury might reasonably award £50 damages or more.

Held also, that the case was one in which the discretion of the Lord Chief Justice must be interfered with, and that the Court was entitled in a proper case to review the remitting of an action by a Court of first instance.

Appeal by the plaintiff from an order of Moore, L.C.J., dated October 13th, 1933, remitting for trial to the County Court Judge of Down an action brought by the plaintiff for personal injuries and for damages to a horse and van sustained by reason of his having been knocked down by the defendant's motor lorry, on 10th June, 1933.

After the accident, the plaintiff was taken to hospital, his chest was strapped, but he was not

(1) In the Court of Appeal before Andrews, L.J., and Best, L.J

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detained, and he afterwards proceeded to his own home in a tram car.

He stated in his affidavit that he sustained fractures to three ribs, his chest was plastered and strapped, and he suffered a great deal from pain and shock. After three weeks treatment he was X-rayed at the Royal Victoria Hospital, Belfast, and his chest was again plastered and strapped, and he was unable to follow his occupation. He also stated that his weekly earnings prior to the accident were between £5 and £6 per week.

He had, he stated, received an account for repairs to his harness amounting to £4 15*s.* 0*d.* and one for repairs to the van amounting to £3 15*s.* 0*d.* He was, he said, obliged to sell his horse after twelve weeks unemployment.

The horse had developed a limp after the accident and he estimated the loss from it at £3 0*s.* 0*d.* He had incurred medical expenses to the extent of £5 5*s.* 0*d.*

The defendant, in his affidavit, stated that he had a good and valid defence to the action both at law and on the merits, that he was guilty of no negligence, that no damage was done to the pony, and that the only damage done to the van was that the shafts were broken, and that a sum of £2 would repair the damage.

He also stated that the plaintiff did not appear to have received any injuries whatever, and that he had no visible means of paying the defendant's costs should a verdict not be found for him.

Doctor J. S. Morrow, in his affidavit, on behalf of the defendant, stated that if the plaintiff sustained one or even two broken ribs he had long since fully recovered from same and had long since been able to resume his occupation. He also stated that the plaintiff's general health, apart from his defective eyesight, was satisfactory.

Doctor Rex W. Burrell, in his affidavit on behalf of the plaintiff, stated that the X-ray photograph showed that the broken ribs were partially united but that there were fragments of broken bone at the point of each fracture which were still jutting in on the inner chest wall.

Mr. Maitland Beath, consulting radiologist, in reply, swore an affidavit in support of the motion in which he stated that on the 26th September, 1933, the plaintiff was radiographed at the Royal Victoria Hospital, Belfast, and that there was no record in the department books of the Hospital of any other examination having been carried out of the plaintiff.

He also stated that the X-ray examination disclosed what appeared to be old fractures of the third, fourth and fifth ribs in the posterior axillary line below the scapula, on the left side.

He further stated that the X-ray plate showed no evidence of any detached fragment and showed that bony union had been completely established especially in the fourth and fifth ribs where the fractures were surrounded by smooth ensheathing callus. The alignment of all three ribs, viz., the third, fourth and fifth, was good.

He concluded his affidavit by stating that there was no radiograph evidence of any condition at the site of injury to cause the disability of which the plaintiff complained or any other disability whatever.

Beattie, K.C., and *Fox* for the plaintiff :—

This action should not have been remitted.

It is upon the medical evidence of the plaintiff that this motion should be decided. There is medical evidence to show that this man was taken unconscious to the hospital.

We submit that damages have been shown amounting to more than £50. A condition of injuries of sufficient seriousness has been shown to warrant the action being retained in the Superior Courts. *Eccles v. Murphy* (1), decided that in such a case it was the duty of the Court to examine the medical evidence and consider whether that evidence warranted the action being retained. In that case, Best, L.J., stated in his judgment that if a case is one where a jury may award £50 or more, it is the clear duty of the Court to retain the case.

(1) 66 I.L.T.R. 45.

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Murphy, K.C. (with him *Topping*) for the defendant :

This is not a case in which a quasi discretionary order should be reversed. It is not suggested that there were any actual wounds.

The Court cannot disregard the evidence of the consulting radiologist, Mr. Maitland Beath. If the Court is in doubt it should look at the X-Ray plate.

In *Eccles v. Murphy* (1), it was stated in the medical affidavit sworn on behalf of the plaintiff that the injury to the plaintiff's leg was permanent. This evidence differentiates that case from the present.

In *Marron v. Hunter* (2), it was held that the Court of Appeal will not reverse the decision of the Court below, remitting an action, where that Court has exercised its discretion, except in a very strong case, even though the members of the Court of Appeal might have exercised their discretion in a different way.

It is apparent from the judgments of the Court of Appeal in *Curley v. Gregan* (3), that the Court must pay special attention and regard to the judgment of the Court below. In that case, Barry, L.J., said he was very slow to disturb these quasi discretionary orders.

It is very doubtful whether the plaintiff could recover more than £50.

Beattie, K.C. (in reply) :—

In *Eccles v. Murphy* (1), Best. L.J., said, " the Court " will not try the case upon affidavit, and will not " decide which doctor is to be believed."

We submit that the rule laid down in *Eccles v. Murphy* (1), should be observed.

Dyer v. Wallis (4), decided that the Court in order to test the substantiality of the case, will take into consideration the probable amount of damages that will be recovered, and if in their opinion, such damages will not or ought not to exceed £50, the case will be

(1) 66 I.L.T.R. 45, 46.
(2) 23 I.L.T.R. 2.
(3) [1895] 2 I.R. 320.
(4) 36 I.L.T.R. 140.

remitted. In the present case, however, damages to a greater extent than £50 have been proved.

This is a substantial action which should be retained in the superior courts.

ANDREWS, L.J., delivered the judgment of the Court as follows:— ANDREWS, L.J.

We have carefully considered this case. The fact that the arguments have occupied two hours lends some support to the view expressed by counsel that a definite statement of the principles upon which the Court acts in these remitting motions is desirable.

The question which has always to be determined under section 6 of the Common Law Procedure Act (Ireland), 1870, is whether the plaintiff has a cause of action fit to be prosecuted in the Superior Court. The test which the Court puts to itself in answering this question in cases such as the present is whether the case is one in which a jury may reasonably award £50 damages or more. If the answer be in the negative, the action should be remitted. This figure of £50 (formerly £40) was arrived at by the Courts as being the limit of the original jurisdiction of the County Court. The Court will also remit an action if it is a sham action, *i.e.*, not a real *bona fide* action, or if, though honest, it is an action of small magnitude or of little importance. Such actions are not fit to be tried in the Superior Court, because, as pointed out by Fitzgibbon, L.J., in *Marron v. Hunter* (1), they are *more fit* to be tried in the County Court.

A further principle is, in our opinion, too well settled to admit of any doubt. The Court will not try the case on conflicting medical affidavits and determine for itself which is the more likely to be correct. It refrains from doing so because of the difficulty of testing evidence without an opportunity being provided for cross-examination, and also because to do so would be to undertake the duty and, in fact, to prejudge the decision of the jury at the trial. This does not necessarily mean that the Court is bound to accept everything that is deposed to on affidavit by or on

(1) 23 I.L.T.R. 2.

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behalf of the plaintiff; but it is, in our opinion, the duty of the Court, for the purpose of the remitting motion, to accept such evidence given on behalf of the plaintiff as is entitled to reasonable credence. These principles are in full accord with those acted upon by this Court in *Eccles v. Murphy* (1).

[Having stated the facts, Andrews, L.J., continued.]

On the evidence of Doctor Burrell the plaintiff's sufferings will be prolonged. The plaintiff has stated that his average weekly earnings prior to the accident were between £5 and £6 per week. This figure may be and probably is somewhat exaggerated; but, as the plaintiff was off work for about eleven weeks, and as there is no suggestion that he could have resumed work sooner, we think the plaintiff's damages on this head alone may reasonably amount to £30. There is also evidence of damage to the horse estimated at £3, to the van at £3 15*s.* 0*d.*, to the harness at £4 15*s.* 0*d.*, and medical expenses are claimed at £5 5*s.* 0*d.* In addition to this, the plaintiff incurred considerable expense in the feeding of his horse during the period that he was unable to use it. In our opinion, when we remember further the pain and suffering which he endured, it cannot be said that a jury could not reasonably award more than £50 damages.

On the question whether this Court should interfere with the discretion exercised by the Lord Chief Justice, we respectfully adopt the words of Walker, C., in *Curley v. Gregan* (2), when he said, "I think it is our "duty when a case comes here on appeal, which, on its "facts and circumstances is, in our judgment, fit to "be tried in the Superior Courts, that we should so "hold." In the same case, Barry, L.J., said, "I "recognise no case in England or Ireland deciding "that this Court is not entitled, nay, bound, in a "proper case, to review the remitting of an action by "a Court of first instance."

In our opinion, therefore, whilst always paying due regard to the view expressed by the Judge of first instance, we have full power to exercise our own

(1) 66 I.L.T.R. 45.

(2) [1895] 2 I.R. 320, 322, 324.

discretion in these cases ; and, further, it is our duty to reverse the order appealed from if, applying the principles above stated, it appears to us to be necessary or proper that we should do so. We allow this appeal with costs.

Solicitors for the plaintiff : *N. & F. Tughan.*
Solicitor for the defendant : *J. Morris McKee.*

J. McC.

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Jan. 20. Feb. 3, 10.

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May, 2, 3, 18.

KER AND OTHERS v. MARQUIS OF DUFFERIN AND AVA AND OTHERS (1).

Landlord and Tenant—Lease—Portion of Lands sold in Land Purchase Commission—Portion acquired compulsorily by Urban Council—Whether residue of lands liable for residue of Rent—Apportionment of Rent—Northern Ireland Land Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 34).

By a lease, dated 12th December, 1857, the plaintiffs demised to the defendants an area of 746a. 1r. 8p. at an annual rent of £567 1*s.* 6*d.* The said rent was adjusted to £565 15*s.* 6*d.* under the Local Government (Ireland) Act, 1898; later, 51a. 0r. 21p. were acquired compulsorily by the Bangor Urban Council and the rent reduced by £34 10*s.* 2*d.*

A further 459a. 1r. 34p. in the hands of agricultural tenants were sold under the provisions of the Northern Ireland Land Act, 1925, and the rent payable to the defendants reduced by £260 1*s.* 2*d.* Finally, under the same Act, the defendants purchased from the plaintiffs 113a. 1r. 2p. of the lands comprised in the lease on which an annual rent of £34 was apportioned by the Court. In the result only 114a. 1r. 22p. of the original 746a. 1r. 8p. remained within the lease. The plaintiff contended that the residue of the rent, £237 4*s.* 2*d.*, was borne by and was payable out of the 114a. 1r. 22p.

Held, by the Court of Appeal (affirming the decision of Moore, L.C.J.), that the defendants, as assignees of this 114a. 1r. 22p., were not bound by such apportionments and reductions; and, accordingly, that they were not liable for the residue of the original rent, but only for an apportioned part of it determined according to the ratio which the value of the premises now vested in them bears to the value of the remainder of the premises demised by the lease.

ACTION to recover £474 8*s.* 4*d.* alleged to be due for two years arrears of rent reserved by indenture of lease, dated 12th December, 1857, issuing and payable out of lands situate in the townland of Ballysallagh, County Down, in respect of which it was alleged that the annual rent of £237 4*s.* 2*d.* was payable. The defendants were sued as the persons in whom "the interest of the lessee under the said lease is now "vested." The action was not brought upon the

(1) In the Court of Appeal before Andrews and Best, L.JJ.

covenant but against the defendants as assignees in possession.

The lease, dated 12th December, 1857, was for a term of ninety-nine years from 1st November, 1856; the area was 746a. 1r. 8p., and the rent reserved £567 1*s.* 6*d.* The area and rent underwent several successive reductions. First, under the Local Government (Ireland) Act, 1898, the rent was adjusted to £565 15*s.* 6*d.* In or about 1907 the rent was reduced by £34 10*s.* 2*d.*, when 51a. 0r. 21p., were acquired compulsorily by the Bangor Urban Council under an award of 11th April, 1906. This was followed by the sale of 459a. 1r. 34p. under the provisions of the Northern Ireland Land Act, 1925, and the rents which then ceased to be payable by the tenants to the defendants amounted to £260 1*s.* 2*d.* Finally, under the Northern Ireland Land Act, 1925, the defendants purchased from the plaintiffs a portion of the lands comprised in the lease of 1857, known as Cairn Wood, comprising 113a. 1r. 2p. on which, after special application to the Court by the defendants, a rent of £34 was apportioned; and it was upon this figure that the purchase price and purchase annuity of that holding were calculated.

The result of these transactions was that of the original 746a. 1r. 8p. only 114a. 1r. 22p. remained within the lease; and, after making the deductions arising from the several transactions referred to above there remained a rent of £237 4*s.* 2*d.*, which the plaintiffs contended was payable out of these 114a. 1r. 22p. The physical possession of these 114a. 1r. 22p. lay not in the defendants but in the Bangor Corporation as successors to the Bangor Urban District Council. The latter body had by assignment acquired a judicial tenancy in the lands which was created by an agreement of 3rd March, 1911, subject to a yearly rent of £50 per annum.

Lowry, K.C., and *Hume*, for the plaintiffs.

Murphy, K.C., *Black, K.C.* and *Chambers* for the defendants.

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KER AND OTHERS v. MARQUIS OF DUFFERIN AND AVA AND OTHERS.

SIR WILLIAM MOORE, L.C.J.

MOORE, L.C.J.: This was an action brought by the trustees of the Ker Estate against five persons representing the Dufferin Estate for £474 arrears of rent payable out of certain lands in the townland of Ballysallagh, in the County of Down. These lands were held under Lease, dated the 12th day of December, 1857, for a term of ninety-nine years expiring in 1956, and made by the predecessors of the plaintiff demising an area of 746a. 1r. 8p. to the predecessor of the defendants.

I have not seen the Lease in question and this is founded on the statement of Counsel.

The first three defendants were sued as representing the original lessee but as the action was brought in debt and not in covenant I found considerable difficulty in dealing with them, as apparently they had not been in possession of any of the demised lands during the period in which the rent sued for accrued. During my consideration of the case I expressed this difficulty to Counsel, and thereupon the following consent was entered into in open Court:—

> That Hariot Georgina Dowager Marchioness of Dufferin and Ava, Henry Charles Somers Augustus Somerset and Charles William Trotter be struck out of the action without costs; also, that the remaining defendants, Brenda Cecilia Somerset, executrix of the third Marquis of Dufferin and Ava, and Basil Sheridan Marquis of Dufferin and Ava be treated as if assignees of the lessee's interest in the Lease of 12th December, 1857, so far as subsisting.

The arrears claimed for amounted to £474 8*s.* 4*d.*, and accrued by four half-yearly gale days, beginning the 1st day of May, 1930, to the 1st day of November, 1931, and the annual rent is put by plaintiffs at £237, but I do not accept their computation.

These lands were described on a map and became eventually divisible into four parts coloured respectively blue, which I call part "A," green, part "B," yellow, part "C," and brown, part "D."

Most of the facts in the case on which I base this judgment came before me by way of admission and were not contested, but I have not had all the

documents before me to check them, and Counsel's statements on each side were accepted.

The part marked "A" was taken out of the Lease by virtue of an award made under the Local Act enabling the Urban Council of Bangor to acquire land for the purpose of waterworks. This was done under an award made in 1907 by Mr. J. Ormsby Lawder, Government Arbitrator, by which the rent of £567 1*s.* 6*d.* was reduced to £531 5*s.* 4*d.*, and the representatives of the plaintiffs were duly compensated in respect of said reduction, the area in question being 51a. 0r. 21p. The effect of this was reduce the demised area by the amount stated and the rent accordingly could then have been apportioned for the lands remaining in the possession of the lessee but this was not done. However, I do not think this material.

The part of the premises coloured green and marked "B" consisted of 459a. 1r. 34p. in the possession of agricultural tenants and these premises became subject to the provisions of the Northern Ireland Land Act of 1925 in proceedings in which the representatives of the defendant were named as vendors. It subsequently transpired, however, that they had not sufficient interest within the meaning of section 20 of the Northern Ireland Land Act, 1925, to act as such vendors, and the present plaintiffs, upon motion before the Land Purchase Commissioner, applied to have them struck out and their own names substituted as owners of the land in question. This application was evidently acceded to by Mr. Commissioner Megaw as he then was, and the defendants by order of the Commissioner of March 27th, 1928, were accordingly struck out, and the plaintiffs substituted in their place, with consequent directions as to the continuance of the proceedings.

I am informed that by order of the Land Purchase Commissioner the sum of £261 12*s.* 0*d.* was subsequently fixed as the fair proportion of rent for the lands called "B," but I have not seen the order, and subject to anything it may contain, I do not think that such estimated reduction would necessarily be binding on anybody except the plaintiffs and the Land Com-

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mission as an apportionment, as it would appear to have been made after the defendants or their representatives had been struck out of the proceedings.

This sale diminished the demised area by a further 459a. 1r. 34p.

As to part "C" containing 113a. 1r. 2p., on the 7th day of July, 1930, this became vested in the Land Purchase Commission, and was by them transferred to the defendant on terms of his repaying the amount advanced by instalments based on an estimated rent of £30 a year to be paid to the plaintiffs, and such lands are now in the possession of the Marquis of Dufferin and Ava as a purchasing tenant but have been taken out of the Lease, and the original rent proportionately abated, by £34 per annum as Mr. Lowry says, though Mr. Murphy differs, and says £30 per annum for which an instalment of £26 per annum is now paid to the Land Purchase Commission.

But the possession of the defendants under this has no reference to the lessees' interest under the lease.

These transactions on account of "B," £261 12*s.* 0*d.*, and £34 (£30 ?) on account of "C" taken from the rent of £531 5s. 4d. would leave the balance of the original rent at something in the neighbourhood of £250 per annum, but I do not accurately find the precise figures.

I have not done more than state the general effect of these transactions as I think at the present stage it is not necessary in the view I take of the law to pursue them too closely.

The present position, however, is this—that the plaintiffs are suing the defendants, who remain in possession of the lands "D," containing 114a. 1r. 22p., for the entire balance remaining unredeemed of the original rent of £567 1*s.* 6*d.*, which balance, they claim, amounts on their showing to £237 4*s.* 2*d.* I do not necessarily accept these figures but consider closer examination unnecessary.

The facts about "D" are that it is the sole part of the demised premises now remaining in the possession of the defendants. They occupy it by their tenants,

the Bangor Urban Council. The Council hold it under them at a judicial rent of £50 a year.

As under the Land Purchase Code, see section 8, sub-section (3) (*f*) of Northern Ireland Land Act, 1925, the purchase provisions do not apply to any lands held by a public authority for the purposes of their powers and duties, the lands in "D" cannot be bought out and defendants only receive from them the annual sum of £50.

Their Counsel during the hearing of the action commented strongly on the hardship to the defendants which the plaintiffs' claim would involve if it succeeded, namely, that out of the only part of the estate of which they are now in possession they would receive but £50 per annum from Bangor Council and would have to pay £237 per annum (or some such sum) to the plaintiffs, for the remainder of the term.

I do not think it necessary to detail any further facts, as the solution of the problem depends on the value of these portions, and not on the various prior transactions in regard to them. For that reason I have not thought it necessary to examine them more closely.

How, then, does the law stand ?

I have very carefully considered the matter and the authorities quoted and I am glad to say I have arrived at a decision without very much doubt.

Counsel for the defendants cited to me a number of authorities showing that in cases where the lessor had made a lease without title and both the lessor and lessee were afterwards evicted by title paramount as to portion of the lands, that the balance of rent remaining on the remaining lands should be apportioned. This, however, is now admitted law. The first question, however, to be considered is : Can the defendants be sued at all as being only assignees of part ? It will be noted that this is not an action on the covenant contained in the lease of 1857. It is a pure action of debt and it is brought against the defendants as assignees of the lessee on privity of possession between them and their lessors, the plaintiffs, for their use of the land remaining in the lease, viz.,

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"D." I find that actions of this sort are not limited merely to cases where the lessee has been evicted by title paramount and as a matter of common sense I do not see why they should. In *Smith v. Malings* (1), referred to by Mr. Murphy, a decision of Chief Justice Popham, which, however, I have only found in the Digest, it was decided that a surrender by the lessee to the lessor of part of the demised premises entitled the lessor to an apportioned rent on the unsurrendered part but I think the law is clear that in an action of debt the right to apportionment arises when by any ordinary legal process or devolution the lessee or his assignee finds himself in possession of only a remaining part of the whole. Such was the case in *Dooner v. Odlum* (2), where my late brother Mr. Justice Dodd exhaustively reviews all these authorities, and lays down expressly this conclusion, and his judgment was approved by the Court of Appeal. The facts would appear to be very much the same in *Salts v. Battersby* (3), and again the facts in *Mitchell v. Mosley* (4), would seem to be still more in correspondence with those in the present action and in all these cases, where the assignee of the lessee was in possession of part only of the original demise, it was held that his rent was apportionable in respect of such part and accordingly recoverable. No doubt it might be the law that such apportionment should have been entered on and arrived at after each severance as regards "A," "B" and "C" but this was not done, and I hold that the defendants are now only liable to an apportioned part of the original rent in respect of the lands called "D," and are so liable only on account of the privity of estate which exists between them and the plaintiffs in respect of "D" which alone as assignees of the original lessees they still retain.

I cannot accept the ingenious suggestion of Mr. Hume that by virtue of these several redemptions *pro tanto* of the rent on "A," "B" and "C," that of "D" had become automatically apportioned already,

(1) Cro. Jac. 160.
(2) [1914] 2 I.R. 411.
(3) [1910] 2 K.B. 155.
(4) [1914] 1 Ch. 438.

without further inquiry. In the absence of any evidence of agreement to support this theory I am satisfied that no apportionment ever took place in which the value of "D" as such could have entered into as an element.

Had this occurred I am sure that no apportionment would have been made which would leave as the plaintiffs claim, over a third of this heavy rent payable out of about a sixth of the lands, and those admittedly the poorest part of them all. I do not therefore think he is correct in saying that the defendants in respect of "D," are looking for apportionment.

In *Salts v. Battersby* (1), to which I have already referred, which was an appeal from the County Court, the King's Bench Division held that the apportionment should be made on the value of the premises as they existed at the date of severance. This was practically the view of Lord Darling alone. I treat that decision with respect but I do not see my way to follow it in the circumstances of the present case. I know that "D" is the poorest part of the lands demised—defendants' witness, Mr. Barton, a land agent of great experience, said that the whole of "D" was only worth £42 a year and the Land Commission only fixed £50 a year on it. I do not know on what bases the original rent was calculated, and I can not assume on the evidence before me that it was an acreable rent fixed throughout on an acreable basis which assumed that the lands were of equal value; I now know that they were not. There is nothing now left to apportion the rent of "D" with, except the rest of the whole of the demised lands no matter what transactions took place in respect of it.

I think that the fairest way of arriving at the apportioned rent for the lands "D" is to see what their present ratio of value is to the total value of lands "A," "B" and "C," and that the apportioned rent to become due and payable out of "D" will bear the same ratio to the original rent of £567 1*s.* 6*d.* as the respective values of the two portions, "A," "B," "C" on the one hand and "D" on the other bear *inter se.*

(1) [1910] 2 K.B. 155.

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SIR WILLIAM MOORE, L.C.J.

On this question of value I asked the parties if they were willing for me to send down a qualified person to report to me, but they declined. Mr. Lowry said that as he held the rent on "D" was in no event apportionable he had not (and apparently would not) consider the question of value, Mr. Murphy also refused. Mr. Murphy calculated that it should be arrived at on values being 50-344th of £531 5*s.* 4*d.*, at the rate of £78 a year. I do not adopt his calculations but it is a guide. I remember the Land Commission have fixed on "D" a rent of something under 10/– an acre.

The defendants themselves have brought into Court £177 2*s.* 0*d.* for two years' rent which is at the rate of £88 11*s.* 0*d.* per year. I do not think they should be finally bound by this, as defendants will often lodge more in Court to cover actual liability than is actually due, but in the circumstances I will follow the course taken by Dodd, J., in *Dooner v. Odlum* (1), and in the absence of professional assistance apportion the rent on "D" myself as £80, part of the original rent of £567 1*s.* 6*d.*, as a fair contribution to the original rent from lands "D."

I am quite aware that this figure may not or will not represent the whole balance of the unredeemed original rent, and plaintiffs may well ask how they are to recover that. That, of course, is for their advisers.

The rest of the demised lands have now gone and presumably their share of the remainder of the original rent with them. But it must be remembered that at each severance the plaintiffs were consulted or compensated as a matter of contract or in Court, and if they did not sufficiently before each tribunal protect their own interests under the lease of 1857 against possible loss arising under the provisions of the Land Purchase code, they have only themselves or the Legislature to blame.

The plaintiffs will have judgment for two years' rent at £80, making £160 for the two years sued for, with costs up to defence.

The defendants will have paid out to them £17 2*s.* 0*d.* of the moneys in Court, leaving £160, and then their

(1) [1914] 2 I.R. 411.

taxed costs of the action since and including their defence, any costs due to the plaintiffs up to defence to be set off and the balance, if any, of the £160 to be paid to the plaintiffs on foot of their judgment in this action.

The plaintiffs appealed to the Court of Appeal.

Lowry, K.C., *Hume, K.C.*, and *MacDermott* for appellants :—

In all the cases that were relied upon by the defendants relating to eviction, either by the landlord or by title paramount, there had been a default of some sort on the part of the lessor either by repudiating his own letting or by his failure to have the title to enable him to make the letting. Lord Dufferin could have applied to the Court for compensation for his intervening interest if it had been of any value. It is an attempt by the tenant to make use of Land Purchase Acts to avoid his liability at the expense of the plaintiffs. The effect of the second apportionment claimed by the defendants here would be to enable them to get rid of their liability to pay a rent which they considered too high while, at the same time, by themselves or their tenants, they retain possession of all the lands.

Murphy, K.C., *Black, K.C.*, and *Chambers* for respondents :—

Only part of the lands demised by the lease of 12th December, 1857, is now vested in the defendants and in regard to such part the defendants are merely assignees of the lessees' interest. The assignee of part only of the demised premises is not liable to be sued for the entire rent reserved by the lease but only for an apportionment part thereof. *Salts v. Battersby* (1) : *Dooner v. Odlum* (2). The apportionment must be determined according to the ratio which the value of the premises now vested in the defendants bears to the value of the remainder of the premises demised by the lease.

(1) [1910] 2 K.B. 155. (2) [1914] 2 I.R. 411.

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The object of section 14 of the Northern Ireland Land Act, 1925, is merely to fix a basis for the calculation of the "standard price" at which holdings are to be deemed to be sold to the Land Commission and to be resold by them to the occupying tenants.

The section does not purport to fix the apportioned part of the rent reserved by a lease which is to remain payable in respect of those portions of the demised premises excluded from the operation of the Land Purchase Acts. In the absence of any express statutory provision to the contrary such apportioned part must be fixed in accordance with the principle set forth in *Dooner v. Odlum* (1). The amount alleged by the plaintiffs to have been apportioned by the Land Commission upon the land subject to the operation of the compulsory purchase provisions of the Northern Ireland Land Act, 1925, is merely an aggregate of sub-rents. It is not, nor was it ever intended to be, an apportionment of the original rent reserved by the lease so as to determine the amount payable in respect of those portions of the demised premises which remained outside the scope of the Act.

The operation of section 8 of the Northern Ireland Land Act, 1925, really amounts to a statutory eviction by title paramount of both the landlord's and tenant's interest in holdings subject to the Act. When portion of the premises demised by a lease is evicted by title paramount the lessee is entitled to have the rent apportioned on the basis of the proportion which the value of the part evicted bears to the value of the remainder of the demised premises. *Walker's Case* (2). *Smith v. Malings* (3). [They also referred to *Stevenson v. Lombard* (4); *McLoughlin v. Craig* (5); *Mercer v. O'Reilly* (6); *Irish Society v. Tyrrell* (7); *Simmonds v. Farrell* (8); *Hartley v. Maddocks* (9).

(1) [1914] 2 I.R. 411.
(2) 3 Co. Rep. 22a.
(3) Cro. Jac. 160.
(4) 2 East 575.
(5) 7 Ir. C.L.R. 117.
(6) 13 Ir.C.L.R. 153.
(7) 16 Ir.C.L.R. 249.
(8) I.R. 8 C.L. 1.
(9) [1899] 2 Ch. 199.

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Hume, K.C. (in reply) :—

In every authority quoted by the defendants there was an action for the whole rent reserved by the lease. Here the plaintiffs are not claiming for the whole rent.

The ejectment is by the tenant purchaser. The effect of the Land Acts is that the purchasing tenants are still in possession of lands, now in fee simple, and cannot be said to be evicted. How can they be said to be evicted from lands of which they were not in possession, and for which, if they chose, they could have obtained compensation under section 15 of the Irish Land Act, 1903. Section 7 of the Landed Estates Court (Ireland) Act, 1858, gives the Land Commission jurisdiction to apportion between land sold and lands unsold.

There has been a definite statutory apportionment made at the request of the defendants and there can be no second apportionment.

Cur. adv. vult.

ANDREWS, L.J.

MAY 18.

ANDREWS, L.J. (delivered the judgment of the Court) :

I do not propose to deal at length with the facts of this case or the arguments which were addressed to us. The former are fully set out in the considered judgment of the Lord Chief Justice ; and the opinion which we have formed upon the legal aspect of the case permits of brief exposition.

The action is brought to recover £474 8*s.* 4*d.* alleged to be due for arrears of rent reserved by an Indenture of Lease, dated 12th December, 1857, issuing and payable out of lands situate in the Townland of Ballysallagh, County Down, in respect of which it is alleged that the annual rent of £237 4*s.* 2*d.* is now payable. The claim covers two years to 1st November, 1931. The defendants are sued as the persons in whom "the interest of the lessee under the said lease "is now vested." The action is not brought upon the covenant, and no attempt was made in the proceedings to show that the defendants or any of them were under any direct liability upon it. They must be treated as

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simply assignees in possession, or, as Mr. Black called them, *terre* tenants.

The lease of 1857 was for a 99 year term from 1st November, 1856; the area was 746a. 1r. 8p., and the rent £567 1s. 6d. The area and rent have undergone several successive reductions. First came an adjustment under the Local Government (Ireland) Act, 1898, at £565 15*s.* 6*d.* Next a reduction of £34 10*s.* 2d. in the rent, when 51a. 0r. 21p. were acquired compulsorily by the Bangor Urban Council under an award of 11th April, 1906. This was followed by a sale of all the tenanted land to the tenants under the provisions of the Northern Ireland Land Act, 1925. The area so sold consisted of 459a. 1r. 34p., and the rents which then ceased to be payable by the tenants to the defendants amounted to £260 1*s.* 2*d.* It is only a matter of historical interest that in this sale it was necessary to substitute the present plaintiffs as vendors for the defendants owing to the latter's interest for the unexpired residue of the 99 year term being inadequate. Finally, there came the purchase under the Act of 1925 by the defendants from the plaintiffs of portion of the lands comprised in the lease of 1857, known as Cairn Wood, comprising 113a. 1r. 2p., on which, after special application to the Court by the defendants, a rent of £34 was apportioned; and it was upon this figure that the purchase price and purchase annuity of that holding were calculated.

In the result only 114a. 1r. 22p. of the original 746a. 1r. 8p. remain within the lease; but, after making all deductions arising from the several transactions to which I have referred, there remains a rent of £237 4*s.* 2*d.*, which the plaintiffs contend is now payable out of these 114a. 1r. 22p. They say, in effect, that the residue of the rent must be borne by and paid out of the residue of the lands.

There can be no doubt that if this action were brought against the original covenantor or his personal representatives, there would be no answer to the plaintiff's claim. The original liability for rent would only be diminished by the recognised apportioned reductions made under the authority of Acts of

Parliament, some of which permitted and others of which effected the compulsory acquisition and transfer of portions of the lands comprised in the lease. The only question which we are called upon to determine is whether the same liability attaches to the present defendants, who, as I have stated, are sued not on the covenant but merely because they are in possession. I should, perhaps, mention that the physical occupation of the lands lies not in the defendants but in the Bangor Corporation, as successors to the Bangor Urban District Council. The latter body had by assignment acquired a judicial tenancy in the lands which was created by Agreement of 3rd March, 1911, subject to the yearly rent of £50 per annum. Accordingly, if the plaintiffs are entitled to succeed in this action, the defendants will be called upon to pay for the residue of the term an annual rent of £237 4s. 2*d.* in respect of lands out of which they will only be receiving an annual rent of £50.

When once the fact is clearly established, as it undoubtedly is in the present case, that the defendants are only sued as assignees in possession, all difficulty seems to us to disappear. We were referred during the argument to *Halsbury*, Vol. 18, page 484, in regard to rent becoming apportionable where the *lessee* ceases to have possession of part of the demised premises. Thus, for example, where the lessee surrenders part, where the lessor re-enters for a forfeiture, where the lessee is evicted under title paramount, or where part of the premises is destroyed by an inundation of the sea, the lessee is entitled to claim apportionment. The *assignee* of an original lessee would, of course, enjoy the same right; but in our opinion his rights are wider. At page 590 of the same volume his position is clearly defined in the following terms:—"The assignee of part only of the demised "premises is liable, like any other occupier, to distress "for the rent of the whole of the premises; but he "is not liable to be sued as assignee for the entire "rent, though probably he is liable to be sued for an "apportioned part." One could cite ample authority in support of the views thus expressed, but I do not

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propose to do so, as many of the cases were pleading cases, and all the most important of them were considered in *Dooner v. Odlum* (1), where the "learned "and elaborate" judgment of Dodd, J., was affirmed by the King's Bench Division, consisting of Cherry, L.C.J., and Kenny, J. All three learned Judges were well qualified to speak on the point of property law involved. A fee farm grant made under the Renewable Leasehold Conversion Act to several persons contained a joint and several covenant on the part of the grantees to pay the entire rent reserved by the grant. As between themselves the grantees held their respective shares of the lands in severalty, each paying an apportioned part of the rent. All the estate and interest of one of the grantees in the lands subsequently became vested in the defendant. In an action for the entire rent it was held that the defendant was liable only for such proportion of the rent as was applicable to the share of the lands which had become vested in her. In his judgment, Dodd, J., points out that the rent reserved by the fee farm grant of 1859 was £75 13s. 10d. Portion of the lands were, as he terms it, "segregated" by order of the Irish Land Commission (they had been sold to the tenants under the Land Purchase Acts). On these lands there was apportioned the sum of £37 16*s.* 11*d.*, leaving £38 16*s.* 0*d.* payable in respect of the lands. The £37 16*s.* 11*d.* was redeemed, and the plaintiffs sued the defendant, who was in possession of part only of the residue of the lands, for the entire balance of the rent of £38 16*s.* 0*d.* They sued not on the personal covenant of Mabella Odlum, the grantee from whom the defendant had acquired by assignment, but, as Dodd, J., expressed it, "deliberately on the ground "that the estate and interest of Mabella Odlum is now "vested in the defendant as assignee thereof, and she is "now in possession or receipt of the rents and profits "thereof." The learned Judge states it as his clear opinion upon the authorities that the assignee of part of the demised premises cannot be sued for the whole rent, but that he can be sued for part. He was

(1) [1914] 2 I.R. 411.

satisfied that the grantor was not bound by an apportionment of the rent made by the grantees; but, having sufficient *primâ facie* evidence that the apportionment of £6 9*s.* 4*d.* upon this portion of the lands was just, he ruled accordingly. Cherry, L.C.J., in the course of his judgment (at p. 425), said:—"The "law is, I think, well settled that where a lessee of "demised premises assigns portion of these premises "to a stranger, the assignee is liable to the lessor upon "the covenants contained in the lease only in so far "as those covenants affect the lands in his possession; "and as regards rent, only for an apportioned part of "the rent properly chargeable in respect of the lands "actually vested in him." This, he continued, was established by a line of authorities from *Congham v. King* (1), to *Salts v. Battersby* (2), in which it was held that "the rent in such cases should be apportioned "in proportion to the respective values of the lands "assigned and those retained by the lessee." At p. 426 he points out that the liability of an assignee to pay the rent which the original lessee has covenanted to pay arises not from privity of contract but from privity of estate. The covenant to pay the rent, in addition to the personal liability which it imposes upon the lessee, who enters into it, also affixes upon the land itself a liability to pay, which is distributed over the lands in proportion to the value of each part; and each assignee is liable only in proportion to the value of the lands vested in him.

The present case may be distinguishable from *Dooner v. Odlum* (3), in certain of its facts, but not, in our opinion, in principle. The plaintiffs appear to admit a right of apportionment, as the rent which they sue for is stated to be £237 4*s.* 2*d.* in place of the £567 1*s.* 6*d.* reserved by the lease. They go wrong, however, in our opinion when they arrive at the amount of this apportioned rent by simply deducting other so-called apportioned rents from the original rent. This method ignores the principle established long prior to *Dooner v. Odlum* (3), and re-affirmed

(1) Cro. Car. 221.
(2) [1910] 2 K.B. 155.
(3) [1914] 2 I.R. 411.

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in it, that the true basis of apportionment is value. The proper amount, in other words, is arrived at by a sum in proportion, not by a sum in addition followed by another in subtraction.

When reference is made to the hardship on the plaintiffs involved in this loss of rent from that originally covenanted to be paid, we admit a strong feeling of sympathy. At the same time we would point out, first, that the liability on the covenant may still exist, though, probably, it might be difficult to enforce it. Secondly, one injustice is not satisfactorily removed by the substitution of another; yet this would, in our opinion, be the result of throwing a rent of £237 4*s.* 2*d.* on an acreage of 114a. 1r. 22p., from which an income of only £50 is derived. Thirdly, the plaintiffs' position might easily have been worse than it is, for it is only the chance circumstance of these lands being in the hands of a local authority which prevented them from being sold under the Act of 1925, in which event all liability for rent in respect of these lands would admittedly have terminated. Lastly, we would point out that in the determination of legal issues, consideration of hardship can never be allowed to take the place of legal principles.

In our opinion, the Lord Chief Justice, in fixing the apportioned rent at £80, acted both on evidence and legal principle. Neither Notice of Appeal nor argument directly questioned the reasonableness of the figure at which he arrived. Both were confined to misdirection on the question of law. In our opinion the verdict was in every respect right and proper, and the appeal must be dismissed with costs.

Solicitor for the appellants: *Martin & Henderson.*
Solicitor for the respondents: *Crawford & Lockhart.*

J. R.

ESTATE OF VALENSIN AND BALZANI (1).
TENANT—JAMES DUFFIN.

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Oct. 16.

(N.I. 1391.)

Land Purchase—Lease for Term—Reservation to Lessors of Timber, subject to right of Lessee to cut for fencing—Lessor's rights as to Timber immediately before vesting of lands in Land Purchase Commission—Lessors' rights after Vesting—Northern Ireland Land Act, 1925 (15 *& 16 Geo.*,5 *c.* 34), *section* 8 (1)—*Northern Ireland Land Act*, 1929 (19 *Geo.* 5, *c.* 14), *section* 4 (1).

By a lease, dated the 14th November, 1922, certain lands forming portion of the K. estate in County Antrim were demised to the tenant for a term of twelve years from 14th November, 1921. There was a reservation to the lessors of the timber on the demised premises, save such as the tenant might require for the fencing of the premises.

These lands became vested in the Land Purchase Commission, Northern Ireland, under the provisions of the Northern Ireland Land Act, 1925.

An application was made to the Judicial Commissioners for a determination under section 4 (1) of the Northern Ireland Land Act, 1929, that the vendors were immediately before and after the date of the vesting of the holding in the Land Purchase Commission, entitled to the timber on the lands subject to the right of the tenant, till the 14th November, 1933, to cut for the due and proper fencing of the holding, with liberty to the lessors to enter and cut, fell and take away the timber.

It was held by the Judicial Commissioner that the holding as from the vesting in the Land Commission was subject to the vendor's right or power to the extent claimed by them in their application.

Held, by the Court of Appeal (Andrews and Best, L.JJ.), affirming the Judicial Commissioner that, under section 4 (1) of the Northern Ireland Land Act, 1929, the rights over the timber possessed by the lessors who had become the vendors were preserved as they existed immediately before the vesting; and that the tenant purchaser's interest in the timber was limited to the use of the same for fencing during the unexpired portion of the lease.

APPEAL from an order of the Judicial Commissioner. By a lease made the 14th November, 1922, between Gwendoline Valensin and Nora Balzani, the lessors

(1) In the Court of Appeal before Andrews and Best, L.JJ.

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of the one part, and John Duffin, the lessee of the other part, certain lands forming portion of the "Kilwaughter Estate," in County Antrim, were demised to the lessee for a term of twelve years, from 14th November, 1921.

There was excepted from the operation of the demise "all timber and trees and saplings likely to "become timber now standing or growing on the "demised premises, or any part thereof, save that "the tenant shall be at liberty to cut, lop, and carry "away such timber or trees as the tenant may require "for the due and proper fencing of any part of the "premises."

These lands became vested in the Land Purchase Commission, Northern Ireland, under the provisions of the Northern Ireland Land Act, 1925.

The vendors applied to the Judicial Commissioner (*inter alia*) for a determination under section 4 (1) of the Northern Ireland Land Act, 1929, that they were immediately before the date of vesting the holding in the Land Purchase Commission, Northern Ireland, entitled to a right over the holding and that they had power to exercise an act of ownership or enjoyment in respect of the holding of substantial value, viz., to all timber, trees and saplings likely to become timber now standing or growing on the holding, save such timber or trees as the tenant might require for the due and proper fencing of any part of the holding before the 14th November, 1933, with free liberty of ingress, egress, regress, way and passage, for themselves, their agents, servants, workmen, with or without carriages, carts, and horses to cut, fell, and take away the timber and other trees upon the holding.

The Judicial Commissioner made an order which (*inter alia*) declared pursuant to the provisions of section 4, Northern Ireland Land Act, 1929, that immediately before the date of vesting in the Land Purchase Commission, of the holding, the vendors were entitled to a right over the holding or that they had immediately before that date, power to exercise acts of ownership or enjoyment, in respect of the

holding, as defined in the vendor's application, being a right or power, which was on 28th May, 1925, of substantial value, and which if enjoyed by any other person other than the vendors would have been a profit *à prendre*.

The tenant purchaser appealed to the Court of Appeal.

W. O. Hume, K.C., and *Condy* for the appellant :—

We contend that section 4 (1) of the Northern Ireland Land Act, 1929, enables the Judicial Commissioner to preserve to the vendor the rights that the vendor had on the appointed day.

The landlord had on the appointed day the right to cut the timber, subject to the right of the tenant to cut timber for fencing. The effect of the order of the Land Purchase Commission is that the vendors obtain a larger right than they had on the appointed day.

We submit that the Land Commission ought not to have given the vendors a right of such a character.

McGonigal, K.C., and *Robb, K.C.* (with them *J. D. Chambers*) for the vendors :—

We emphasize the use of the word "now" in the lease. It is "all timber and trees and saplings likely "to become timber *now* standing or growing" that are excepted from the lease and reserved unto the lessors. The right possessed by the tenant was limited. The lease must be construed with reference to all its terms. The landlord had the right under the lease to remove every tree, subject to the tenant's right to cut timber for fencing. The tenant's rights under the lease are limited in point of time.

No more obligations should be imposed on the landlords than were created by the lease. The landlords' rights were strictly limited by the lease, and the same rule must apply to the tenant. If the landlords are to be bound by the words in the lease so must the tenant.

The order as it stands was perfectly right and should be affirmed.

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Hume, K.C., (in reply):—

Apart from the Northern Ireland Land Act, 1929, the landlords' interest in these trees is entirely gone. The effect of the Act of 1929 was to crystallise the interests that existed on the appointed day. It is the rights of the parties on the appointed day that are to be considered.

We submit that the order as it stands is not in accordance with the terms of the Act, and that the appeal should succeed.

ANDREWS, L.J.

ANDREWS, L.J. (delivered the judgment of the Court as follows):—

The question to be determined in this case is a short one—What were the lessors' rights in respect of timber upon his tenant's holding immediately before the date of vesting in the tenant under the Northern Ireland Land Act, 1925? The answer to this question depends, in our opinion, not upon the construction of any ambiguous section of either the Act of 1925 or the amending Act of 1929, but upon the terms of the lease of 14th November, 1922, under which the holding was demised to the tenant for the term of twelve years from 14th November, 1921.

By that lease certain lands were demised subject to (amongst others) the following exception:—

"Excepting and reserving unto the lessors out "of this demise all timber and trees and saplings "likely to become timber now standing or growing "on the said demised premises or any part thereof "save that the tenant shall be at liberty to cut, "lop, and carry away, such timber or trees as the "tenant may require for the due and proper fencing "of any part of the premises hereby demised at "any time during the continuance of this demise."

This clause clearly excepted all the timber on the holding from the demise subject to the right of the tenant to cut and carry away such as he might require for the due and proper fencing of the demised premises "at any time during the continuance of this demise."

It is admitted that under section 8 of the Act of 1925 the lessors would on vesting have lost all their interest in this timber; and section 4 (1) of the Act of 1929 was obviously passed to remedy this injustice. That the present case falls within that section is in our opinion clear. This, indeed, is not disputed. The principle underlying the section is that the rights of the parties in respect of the matters falling within it should be crystallised as they stood immediately before the vesting, *i.e.*, in the present case, immediately before 1st October, 1931.

We are clearly of opinion that at that time the lessors had an absolute right to cut and remove all the timber from the holding save such as might reasonably be required for the due and proper fencing of the holding during the two years and six weeks of the lease which remained unexpired. In our opinion, a Court of Chancery would not have intervened at the suit of the lessee to prevent the lessors' exercise of their right as so expressed. Provided adequate suitable timber was left for fencing during this period, the lessee's rights would not have been prejudiced. We are, accordingly, of opinion that under subsection 4 (1) of the Act of 1929 this right must be preserved to the lessors, who have now become the vendors, and that the tenant purchaser's interest in the timber must be limited to the two years period to which we have referred. If the construction contended for by Mr. Hume were correct, the respective rights of the lessors and tenant would not be crystallised and preserved—the former would be diminished and the latter would be increased; for obviously on such construction the vendors could be restrained from cutting any timber which might at any time prejudice the fencing rights of his purchasing tenant.

The order of the Judicial Commissioner is in our opinion correct, and should be affirmed with costs, subject to such formal amendment thereof as is necessary in order to limit Mr. Hume's consent to the portion of the Order to which it is agreed that it properly applies.

Solicitors for the appellant: *Macaulay & Ritchie.*
Solicitor for the vendors: *John Bristow.* J. McC.

C.A. 1933.

SWAN v. DORMAN LONG & CO., LTD. (1).

Oct. 30. Nov. 21.

Workmen's Compensation—Employer and Workmen—Compensation for Injury by Accident—Man working in cylinder under river—Decompressing Chamber—"Caisson Disease"—Workmen's Compensation Act (Northern Ireland), 1927 (17 & 18 *Geo.* 5, *c.* 16), *section* 1—*Whether workmen may proceed under section* 1, *in respect of injury resulting from an industrial disease—Workmen's Compensation Act (Northern Ireland)*, 1927 (17 & 18 *Geo.* 5, *c.* 16), *section* 44.

The applicant had been employed in the construction of the new bridge in the city of L. over the River Foyle. Part of the work was done in a cylinder, sunk in the river, in which compressed air with a pressure of two or three atmospheres was used to drive out the water. On coming out of the cylinders the workers, before coming into the outside air, passed into a decompressing chamber, where the atmospheric pressure was gradually lowered. If this were not done, they would sustain serious injury called "Caisson Disease."

The applicant had been working at the Bridge for about six months. He worked not daily but frequently in the compressed air chamber, and he had been certified as medically fit for this work. On the 22nd June, 1932, he worked in the cylinder from 6 a.m. to 6 p.m. with intervals for meals. At 6 p.m. he went into the decompressing chamber for the usual time. When he went into the outer air he felt sick and dizzy, followed by heatings all over his body. He admitted that the decompressing operation on this 22nd June was in no way different (including the pressure of air) from that of other days.

The applicant made a claim for injury for accident within the meaning of section 1 (1) of the Workmen's Compensation Act (Northern Ireland), 1927.

The doctor who examined the applicant on 25th June, in his evidence before the Recorder of L., expressed the opinion that he was suffering from "Caisson Disease," caused by coming from a compressed air chamber too quickly into the ordinary air pressure, and the applicant's panel doctor confirmed this opinion. Two other doctors, however, who were examined for the respondents, expressed the opinion that applicant was not suffering from "Caisson Disease," and one of them refused applicant a certificate that he was so suffering.

The Recorder found that the applicant was suffering from this disease brought on by passing too quickly to the ordinary atmospheric pressure; that this was an accident within the Work-

(1) In the Court of Appeal before Andrews and Best, L.JJ.

men's Compensation Acts and that his condition was to be attributed to such accident.

Held, by the Court of Appeal (Andrews and Best, L.JJ.), affirming the Recorder of L., and dismissing the appeal, that the applicant was entitled to proceed under section 1 of the Workmen's Compensation Act, 1927, in respect of injury resulting from an industrial disease, the facts being such as to warrant the finding of accident within that section;

Held, also, that the failure of the decompressing chamber to safeguard the applicant from "Caisson Disease" constituted an "accident" within the meaning of the Workmen's Compensation Acts.

APPEAL by the respondents, Dorman Long & Co., Ltd., from the order of the Recorder of Londonderry, made on 11th July, 1933, awarding compensation to the applicant.

The facts are fully set out in the judgment of Andrews, L.J.

The Recorder found that the applicant was suffering from "Caisson Disease," brought on by passing too quickly, on the 22nd June, 1932, to the ordinary pressure; that this was an "accident" within the meaning of the Workmen's Compensation Acts; and that his condition was to be attributed to such accident.

The respondents appealed to the Court of Appeal.

McCoy for the appellants:—

No accident, no untoward event happened on that 22nd June.

I contend that "Caisson Disease" is a physical condition produced by a natural and gradual process from the nature of the workman's work in the compressed air chamber and was not the result of any accident.

There is no evidence of any defect in the decompressing chamber.

I submit that the learned Recorder did not attach the correct meaning to the word "accident" as used in the Workmen's Compensation Acts.

"Caisson Disease" in itself is not an accident. To constitute accident, there must be some accidental happening to which the disease is attributable. There

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must be something outside the workman himself, which caused the accident

The finding of the Recorder seems to indicate something in the workman himself. It is really difficult to see what meaning the Recorder attached to the word "accident."

I submit that if this event were an "accident" within the Workmen's Compensation Acts, there would be no need for any schedule of Industrial Diseases.

In *Fenton v. Thorley & Co., Ltd.* (1), Lord Macnaghten in his speech in the House of Lords uses the following words:—"I come, therefore, to the conclusion that "the expression 'accident' is used in the popular and "ordinary sense of the word as denoting an unlooked-"for mishap or an untoward event which is not "expected or designed."

Fenton v. Thorley & Co., Ltd. (1) was followed in *Innes or Grant v. G. & G. Kynoch* (2), where Lord Parmoor approved of Lord Macnaghten's definition of "accident."

In *Brintons, Limited v. Turvey* (3), Lord Macnaghten, in his speech in the House of Lords, said: "The "meaning of the expression personal injury by accident, "as used in the Act of 1897, was very fully considered "in the case of *Fenton v. Thorley & Co., Ltd.* (1), in "this House. I am content to abide by what I am "reported to have said in that case." In *Higgins v. Campbell & Harrison, Limited* (4), Collins, M.R., referring to *Fenton v. Thorley & Co., Ltd.* (1), said: "We must look to that case as the expression of "opinion of the highest tribunal as to the interpretation "to be put upon the word 'accident' in the Act." In all these cases the disease was directly attributable to some untoward event.

In *Walker v. Hockney Brothers* (5), a workman gradually acquired paralysis of his right leg through the strain of riding a heavy carrier tricycle for his employers. At the end of five years the condition incapacitated him from work. It was held that the paralysis is not a personal injury by accident.

(1) [1903] A.C. 443, 448.
(2) [1919] A.C. 765, 794.
(3) [1905] A.C. 230, 235.
(4) [1904] 1 K.B. 328, 333.
(5) 2 B.W.C.C. 20.

In the present case, the essential factor is lacking, the onus of proof is upon the workman to prove that the accident occurred in the course of his employment and arising out of it.

In *Evans v. Dodd* (1), a workman was employed to dip rings into a basin of carbon bisulphide with his fingers. He was affected with eczema, caused gradually by the exposure to fumes or splashes from the chemical. The County Court Judge found that this was not an accident within the section. It was held that there was evidence to support the finding.

I submit that in the present case there is no evidence on which the Recorder could properly find that an accident occurred. The Recorder confused dizziness and the other symptoms with accident.

In *Petschett v. Preis* (2), the respondent who was a barber's assistant in the employment of the appellant, began on January 17th to suffer from smarting of the hands, and in February a doctor diagnosed his malady as dermatitis. The respondent continued to work till March 28th, when he left. In April, the respondent's solicitor wrote to the appellant, claiming damages for injury caused by the use of a dangerous dry shampoo. The Judge awarded compensation to the respondent.

It was held, that there was no evidence of an accident at a definite time and place, and there was no notice as soon as possible after the accident, and the respondent was not entitled to compensation.

Petschett v. Preis (2), was a very much stronger case than the present.

I submit that there is no evidence to support the Recorder's finding that this was an "accident."

The proper inference to be drawn is that the applicant contracted "Caisson Disease" in the course of his work. If the learned Recorder was right it was quite unnecessary to have "Caisson Disease" scheduled as an industrial disease.

I submit that the disease was not caused by an "accident."

The proper procedure for the workman to follow is prescribed by section 44 of the Workmen's Compen-

(1) 5 B.W.C.C. 305. (2) 31 T.L.R. 156.

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sation Act (Northern Ireland), 1927. Under that section the workman has to apply for a certificate that he is suffering from a disease mentioned in the Third Schedule and is thereby disabled. From the action of a certifying surgeon in refusing to give a certificate of disablement, there is an appeal to a medical referee.

I submit that the workman has adopted the wrong procedure, that there was no accident, and that the proper inference is that he was suffering from "Caisson Disease," and that all the attributes of an accident were lacking.

Section 1 of the Act of 1927 only applies to cases to which section 44 of the same Act does not apply, and does not apply to the present case. The workman is confined to the procedure under section 44.

Cases of scheduled disease come under section 44, other cases, being those of accident, under section 1.

I submit that the appeal should be allowed and the order of the Recorder reversed. [He also referred to *Clover, Clayton & Co., Limited v. Hughes* (1), and *Alloa Coal Co., Limited v. Drylie* (2).]

Nicholson, for the respondent:—

I submit that section 44 (4) of the Act of 1927 includes every disease whether scheduled or not.

I rely on *Glasgow Coal Co., Ltd. v. Welsh* (3).

In that case a man employed as a brusher in a mine was directed by the mine owners to bale out a large quantity of water which had accumulated at the pit's bottom owing to the breakdown of a pump which had occurred five days earlier. He was engaged in this work which necessitated his standing up to his chest in water for eight hours with the result that he contracted sub-acute rheumatism. Upon a claim for compensation under the Workmen's Compensation Act, 1906, the arbitrator found that the rheumatism was caused by the extreme and exceptional exposure to cold and damp to which the man was subjected on the occasion in question and awarded him compensation.

(1) [1910] A.C. 242.
(2) 6 B.W.C.C. 398.
(3) [1916] 2 A.C. 1, 9.

It was held that the injury was sustained by accident within the meaning of the Act.

In that case Lord Kinnear said in his speech in the House of Lords: "I apprehend it must now be taken "as settled that while a disease is not in itself an "accident it may be incurred by accident, and "that is enough to satisfy the statute."

I strongly rely on this decision as establishing the proposition that where disease is contracted by accident section 1 applies, and section 44 does not apply, even although the case be that of a scheduled disease.

It is pointed out in *Willis's Workmen's Compensation* (28th edition) page 8, that the expression in the section is "by accident," not "by *an* accident." It is also pointed out there that the term by accident includes (*a*) personal injury sustained under circumstances which can be referred to as "an accident," and it also includes (*b*) cases in which there are no such circumstances capable of being so described but in which the results of the occurrence are so unexpected that they may be fairly considered as accidental.

Ismay, Imrie & Co., v. Williamson, (1), was a case where a workman, in a weak and emaciated condition, while raking out ashes from under the boiler in the stokehole of a steamship received a heat-stroke from the effect of which he died. It was held in the House of Lords, by Lord Loreburn, L.C., and Lord Ashbourne, Lord Macnaghten dissenting, that this was a case of death by accident within the meaning of the Workmen's Compensation Act, 1906.

I rely on *Partridge, Jones and John Paton, Ltd., v. James* (2), as conclusively establishing the view which the Recorder took in the present case.

I rely on *Stewart v. Wilsons and Clyde Coal Co., Ltd.* (3), where a workman while engaged in the course of his employment in replacing a derailed coal hutch on the rails severely strained his back. It was held that the injury suffered by the workman was an injury by accident entitling him to compensation, in terms of the Workmen's Compensation Act, 1897.

(1) [1908] A.C. 437.
(2) [1933] A.C. 501.
(3) 5 F. (Ct. of Sess.) 120.

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I submit that it is not necessary for a workman to show anything out of the ordinary as causing the injury. It was an accident within the meaning of the section that the workman contracted the disease. I submit it is not necessary that there should be any external happening. It cannot be suggested that there was no evidence to support the Recorder's finding that this man was suffering from "Caisson "Disease." In this case, the physical evidence is present as strongly as it can be. The heavy pressure of air necessitated physical exertion.

I submit that the workman has discharged the onus of showing that there was an accident on this occasion.

McCoy (in reply):—

I rely on the words used by Lord Kinnear in *Glasgow Coal Co., Ltd. v. Welsh* (1), where he states that "a "disease is not in itself an accident," although it may be incurred by accident.

Referring to the decisions in *Eke v. Hart-Dyke* (2) and *Steel v. Cammell, Laird & Co.* (3), Lord Kinnear said in his speech in the House of Lords in *Glasgow Coal Co., Ltd. v. Welsh* (1), "these decisions are based "on the undisputed principle that disease uncon- "nected with accident is not within the scope of the "enactment."

In *Ismay, Imrie & Co., v. Williamson* (4), there was an untoward event, an unexpected mishap. In the present case the "Caisson disease" did not proceed from any unusual happening during the respondent's work. There is the clearest distinction between *Ismay, Imrie & Co. v. Williamson* (4), and the present case, where the workmen's fellow workers go through the same de-compressing process. He was not performing any physical act that caused that disease.

I submit the test is, "was the disease the cause or "the result." It was the result without an accident.

In *Partridge Jones and John Paton, Ltd., v. James* (5), there was evidence of an accidental event.

(1) [1916] 2 A.C. 1.
(2) [1910] 2 K.B. 677.
(3) [1905] 2 K.B. 232.
(4) [1908] A.C. 437.
(5) [1933] A.C. 501.

I submit (*a*) there was no accident, and (*b*) that even if there was an accident, the wrong procedure was followed. Otherwise section 44 of the Workmen's Compensation Act (Northern Ireland), 1927, was superfluous quâ "caisson disease."

There is, I contend, no evidence to support the Recorder's finding, and the appeal ought to be allowed.

ANDREWS, L.J.: This is an appeal by the respondents in a claim brought under the Workmen's Compensation Acts, by the applicant, Robert Swann, who, at the time of the alleged accident, was employed on the construction of the new Craigavon Bridge in Londonderry. The bridge is supported on columns, a considerable part of each of which is below the surface of the river Foyle. The execution of this work necessitated the sinking in the river of a cylinder in which the men worked and the use of compressed air with a pressure of two or three atmospheres to drive the water out. Men working under these conditions must spend some time—usually fifteen minutes or so—in a decompressing chamber where the pressure is gradually lowered, before coming into the outside air. If this were not done they would sustain serious injury called "Caisson Disease."

The applicant had been working at the Bridge for about six months before 22nd June, 1932. He worked not daily but frequently in the compressed air chamber.

A young man of twenty-four years of age—he was certified and passed as medically fit for the work before he was allowed to engage in it. There is no evidence that he experienced any inconvenience or suffered any injury in connection with the work before 22nd June, 1932. On that day, according to his evidence, he worked in the cylinder from 6 a.m. to 6 p.m. with intervals for meals. At 6 p.m. he went into the decompressing chamber for some little time. When he went into the outer air he felt sick and dizzy followed by heatings all over his body. He admitted that the treatment on this 22nd June was not different in any way (including the pressure of air) from that which he received on other days.

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Doctor Kelly who examined the applicant on 25th June, after describing his symptoms, expressed the opinion that he was suffering from "Caisson Disease" caused by coming from a compressed air chamber too quickly into the ordinary air pressure. Merely "one "coming" too quickly in this way might account for it. Doctor Stevenson, who was applicant's panel doctor, and who first examined him on 29th June, confirmed Doctor Kelly on all the matters I have mentioned. Doctors Alexander and Crosbie, who were examined for the respondents, gave it as their opinion that applicant was not suffering from "Caisson "Disease"; and, indeed, Doctor Crosbie, who admitted he had little experience of "Caisson Disease," refused applicant a certificate that he was suffering from "Caisson Disease." Martin, one of the respondent's engineers, who claimed to have had experience of "Caisson Disease," admitted that the symptoms generally come on at once when the man affected comes too quickly into the ordinary air, and that sometimes the disease occurs in spite of all precautions to prevent it.

On this evidence the learned Recorder found that applicant was suffering from "Caisson Disease" brought on by passing too quickly on this 22nd June, 1932, to the ordinary pressure; that this was an "accident" within the meaning of the Workmen's Compensation Acts; and that his present condition was to be attributed to such accident. Though applicant spent the usual time or possibly a little more in the decompressing chamber on this 22nd June, for some unexplained reason such time was not effective to make it safe for the applicant to go into the ordinary air pressure. The chamber, he found, on this day failed to be effective to safeguard the applicant, and he was of opinion that this failure constituted an "accident" within the meaning of the Acts. He, accordingly, assessed the weekly compensation on the basis of total incapacity at 21*s.* 6*d.*

It was not contested in the arguments before us that there was not ample evidence to support the learned Recorder's findings of fact. Indeed, the fact that the

applicant is and, since 22nd June, 1932, has been suffering from "Caisson Disease" was not contested. Three submissions of law were, however, made on behalf of the respondents. In the first place, it was argued that "Caisson Disease" is an industrial disease, scheduled as "compressed air illness or its "sequellae," in an Order made pursuant to the provisions of section 44 (3) of The Workmen's Compensation Act (Northern Ireland), 1927, and that none of the necessary alternative conditions precedent to recovery under section 44 existed. The applicant had not obtained a certificate under section 44 (1) (i); neither had he been suspended, (section 44 (1) (ii)), nor died, (section (44) (1) (iii)). In the second place, it was submitted that an applicant cannot recover in respect of injury resulting from an industrial disease otherwise than under section 44; and that in no circumstances can such an applicant recover as for a "personal "injury by accident" under section 1 of the Act. Thirdly, that there was no evidence upon which the learned Recorder could properly find that the applicant's injury was caused "by accident" within that section.

The first of these submissions is obviously sound. The applicant applied to Doctor Crosbie as certifying surgeon for the necessary certificate, but this was refused as, in the opinion of the Doctor, the applicant was not suffering from an industrial disease. It was competent for the applicant to appeal from this refusal to a medical referee under section 44 (1) (*f*); but this he did not do; and neither the opinion of the learned Recorder, nor the opinion of this Court, that the certificate was wrongly withheld, can be substituted for this statutory requirement.

The second submission is more difficult and requires careful consideration. Under the Act of 1897 no disease was regarded as a cause of injury unless it was occasioned by accident. Industrial or occupation diseases, in which the disability arose by a gradual and natural process from the workmen's occupation, were, accordingly, wholly excluded. They could not properly be described as "accidents." The law in

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this respect was altered by section 8 of the Act of 1906, which is analogous to, but not identical with section 43 of the Act of the Imperial Parliament of 1925 and section 44 of the Act of the Parliament of Northern Ireland of 1927. The policy of the section was that where any of the conditions to which I have referred is complied with and the disease (specified in the Act or in Orders made thereunder) is due to the nature of the employment, compensation becomes payable under the Act "as if the disease . . . were a "personal injury by accident arising out of and in the "course of that employment." The disease, though not an "injury by accident," is deemed to be such in order to bring it within the compensation provisions of the Act. So far all is clear. But there follows sub-section 4 of section 44 in the Act of 1927 which is identical with section 8 (10) in the Act of 1906. This sub-section enacts that:—"Nothing in this "section shall affect the rights of a workman to "recover compensation in respect of a disease to which "this section does not apply, if the disease is a personal "injury by accident within the meaning of this Act." In other words the old law in respect of such diseases remains unaffected by this provision. If the disease was occasioned by accident, it fell within section 1 of the Act. Counsel for the respondents, Messrs. Dorman Long & Co., Ltd., contends that this express preservation of the rights of a workman, where a disease "*to "which the section does not apply*" is a personal injury by accident, must be construed by implication to deprive the workman of all remedy under section 1 in respect of an industrial disease. He submits that once a disease is established to be an industrial disease within section 44 it cannot, no matter how clearly caused by "accident," come within section 1. Compensation, if recoverable at all, must be under section 44; and, accordingly, either a certificate must be obtained or suspension or death proved before the workman or his dependants can succeed.

If this be the law, it would indeed be a startling result—that legislation designed in favour of the workman should deprive him of a previously existing

right and remedy. Let us take a clear case of accident which I put to Counsel during the argument. A workman, who had never previously worked in compressed air, contracts "Caisson Disease" on the first day of his work in consequence of a defect suddenly and unexpectedly manifesting itself in the air pumping mechanism of the decompressing chamber whilst the workman was being decompressed. Such a workman could clearly have recovered under the "accident" provisions of the Act of 1897. Is he now to be debarred of all remedy unless he brings his case within section 44? Under the Act of 1897 he had merely to establish that his disease was occasioned by accident arising out of and in the course of his employment. If the contention of Counsel for the respondents be correct he would now not only have to satisfy the certifying surgeon or medical referee in regard to his being disabled from earning full wages by a scheduled industrial disease, but he would also have to satisfy the arbitrator in regard to the other requirements of the section. That this is no mere theoretical argument is best evidenced by the facts of this case, in which the applicant failed to satisfy the certifying surgeon so as to bring the case within section 44; yet, the respondents' Counsel now contends that he was wrong in this, and that by reason of his mistake, and the workman's failure to prosecute an appeal in which success at that time might not have been assured, he is now to be deprived of all remedy. I am satisfied such was never the intention of the legislature. I am equally satisfied that it is not the law.

Section 8 of the Act of 1906 conferred, as I have stated, new rights upon workmen injured by industrial diseases. These rights were preserved by section 44 of the Consolidation Act of 1927. When conferring such rights in express terms one would expect the legislature to deprive the workman of any rights which it intended to take away from him in equally express terms. I should, indeed, be reluctant to hold that such rights were taken away by implication or inference in a sub-section designed (unnecessarily, as it appears to me) to preserve rights in respect of

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diseases to which the section does not apply. The true answer, however, to the argument is that the words used in the section are "disease to which this "section does not apply." This phraseology is entirely different from that employed in the earlier part of the section—"disease mentioned in the Third Schedule "to this Act"—; and I, accordingly, hold that the words "disease to which this section does not apply" include not only non-industrial diseases but also industrial diseases to which the section does not apply by reason of the fact that no certificate has been obtained or other necessary condition complied with. This conclusion accords with the view taken by the text book writers. Thus in *Willis on The Workmen's Compensation Acts*, 28th Edition, at p. 11, the learned author, under the heading of "Injury by Disease," writes:—"Some of such diseases are now specially "provided for by section 43" (which corresponds with our section 44) "of the present Act, with the protective "provision that the workman may proceed under section 1 of the Act *in any case* (the italics are my own) "in which he can show that the disease is a personal "injury by accident within the meaning of the Act "(section 43 (4))." So, too, I find in my 4th Edit. (1911) of *Dawbarn on Employers' Liability*, the author, referring to sub-section 10 of section 8 of the Act of 1906 which, as I have stated, is identical with section 44 (4) of the present Act, says that this sub-section "enacts that diseases which apart from this section "would be accidents under the Act are still to be "treated as such." Again, that recognised authority on Workmen's Compensation Cases, His Honour Judge Ruegg, in his Article in *Halsbury's Encyclopaedia*, under the title of Master and Servants, says in perfectly general terms (Vol. 20, par. 355): "A workman may "recover in respect of a disease which is a personal "injury by accident apart from the above provisions" (the industrial diseases sections). Finally, if not a decision, at least as a judicial acceptance of this view, I would refer to *Petschett v. Preis* (1). The applicant, a

(1) 31 T.L.R. 156.

barber, suffered from dermatitis caused by a dangerous dry shampoo, and the Master of the Rolls in giving judgment said that he assumed that the disease from which the man was suffering was a scheduled disease (section 8). The workman, however, had not proceeded under section 8, but under section 1, alleging that an accident took place on a specified day (January 17th). "What evidence," asked the learned Master of the Rolls, "was there. There was none"; and the claim was, accordingly, dismissed. This case appears to me to be a clear recognition by the English Court of Appeal that a workman may proceed under section 1 in respect of injury resulting from an industrial disease if the facts are such as to warrant the finding of "accident" within that section. If such is not his right no evidence of accident would have been looked for.

I pass, accordingly, to Counsel's third and last argument that the facts of this case do not establish "injury by accident" within section 1. It was formerly held in such cases as *Hensey v. White* (1), that the word "accident" as used in the Acts involved the idea of something fortuitous and unexpected. This view was rejected, and *Hensey v. White* (1) was overruled by the House of Lords in *Fenton v. Thorley* (2), in which it was held that in the Acts the word "is used "in the popular and ordinary sense of the word as "denoting an unlooked-for mishap or an untoward "event which is not expected or designed" (per Lord Macnaghten, at p. 448). Lord Shand, at p. 451, said that "it denotes or includes any unexpected personal "injury resulting to the workman in the course of his "employment from any unlooked-for mishap or "occurrence." Lord Lindley (at, p. 453) defined it as meaning "any unintended and unexpected occurrence which produces hurt or loss." *Clover, Clayton & Co., Ltd. v. Hughes* (3), established that what was meant by an event being unexpected was that a sensible man (not a skilled medical man) would not have expected it. *Trim School v. Kelly* (4), further made it clear that

(1) [1900] 1 Q.B. 481.
(2) [1903] A.C. 443.
(3) [1910] A.C. 242.
(4) [1914] A.C. 667.

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injury might be regarded as "by accident" though the act which caused it was deliberate and designed. It was in fact, in the opinion of the majority of the House, any injury and any mishap unexpected by the workman, irrespective of whether or not it was brought about by the wilful act of some one else. In truth, the trend of all authority, including the cases in the House of Lords, has been towards a wider definition and the abolition of all refinements. The latest reported case on the subject is the decision of the House of Lords in *Partridge Jones and John Paton, Ltd. v. James* (1), where *Clover Clayton & Co., Ltd. v. Hughes* (2), was followed and Lord McLaren's definition in *Stewart v. Wilsons and Clyde Coal Co.* (3) was adopted as a guidance to the House. That definition was:— "If a workman in the reasonable performance of his "duties sustains a physiological injury as the result "of the work he is engaged in . . . this is accidental "injury in the sense of the statute."

These authoritative definitions are sufficient for the purposes of our decision without the necessity for a review of any of the numerous other cases in which different judicial minds have endeavoured, not always with consistency, to apply them to very varied states of facts. I shall only say that if the decision of the majority of the House of Lords was correct in *Ismay Imrie & Co., v. Williamson* (4), where a weak and emaciated workmen died from heat-stroke received in the stokehold of a steamship, I find it impossible to say that the learned Recorder had not at least some evidence before him in the present case to justify him in the conclusion at which he arrived, namely, that the failure of the decompressing chamber on this particular 22nd June, 1932, to safeguard the applicant from "Caisson Disease," constituted an "accident" within the meaning of the Acts to this man who had apparently experienced no previous ill-effects from his work, and to whom it was, accordingly, an unlooked-for mishap or an unexpected occurrence.

(1) [1933] A.C. 501.
(2) [1910] A.C. 242.
(3) 5 F. (Ct. of Sess.) 120, 122.
(4) [1908] A.C. 437.

In these circumstances the award of the learned Recorder cannot, in my opinion, be disturbed, and the appeal must be dismissed with costs.

BEST, L.J.: The learned Recorder of Londonderry made an award of compensation to the applicant on the ground that on the 22nd day of June, 1932, personal injury by accident, arising out of and in the course of his employment by the respondents, had been caused to him within the meaning of section 1 (1) of the Workmen's Compensation Act (Northern Ireland), 1927.

The appeal of the respondents is based on their contention that no accident to the workman took place on that or on any other date and that the workman's remedy, if he has suffered any injury, which they do not admit, arises under section 44 by which there is an application of the Act to certain industrial diseases. The respondents in effect say that the applicant has misconceived his remedy and that if, as the learned Recorder has found, he is suffering from "Caisson "Disease" or compressed air illness it is a condition precedent to the recovery of compensation that he should be provided with a certificate by the certifying surgeon or medical referee as required by said section. They further submit that by virtue of sub-section (4) of section 44 it is not open to the arbitrator to award compensation under section one of the Act in any case where a workman is suffering from an industrial disease scheduled as such under the Act, even though he should be satisfied that such industrial disease was caused by accident within the meaning of the Workmen's Compensation Acts.

The Recorder has found that the applicant is suffering from "Caisson Disease," that such disease was brought on by the workman passing too quickly on the said 22nd day of June from the chamber in which the air was compressed and in which he was working to the ordinary atmospheric pressure, that such too quick transmission from the one pressure to the other, resulting in injury to the workman, was an accident within the meaning of the word in the Workmen's

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Compensation Acts, and that the condition of the workman is to be attributed to such accident.

The applicant entered the employment of the respondents on 30th September, 1931, and worked almost continuously with them until June, 1932. Sometime in 1931 he began work in the compressed air chamber as inside lock-keeper and worked in it when required up to 22nd June, 1932, the date of the alleged accident. At times there were two air chambers working and at other times only one but all the time applicant worked in the same air chamber. He was in this air chamber four or five times a week, depending on how the other men were working at the caisson, and his business was to signal to a man outside how much pressure of air was required and to admit crane loads of cement and other material for the erection of the columns that were being built in the bed of the river Foyle at Londonderry to carry the Craigavon Bridge over that river.

The applicant, prior to his being allowed to work in the compressed air chamber, was examined by a doctor on behalf of the respondents and was certified as being fit for the work, and on the question of accident or no accident it is to be noted that no evidence was given to show or suggest that at any time prior to the 22nd day of June, 1932, applicant suffered in any way or experienced any ill effects as the result of working in the compressed air chamber. He gave evidence that this 22nd day of June was not different in any way (to use his own expression) from other days. He worked in the same way in the compressed air chamber and when his work was finished he went into the decompressing air chamber and remained there before going into the outside air in just the same way as on other days, except that he seems to have spent, according to the evidence and finding of the Recorder, a little more time than usual in the decompressing chamber before passing into the ordinary air of the atmosphere.

The learned Recorder says that for some unexplained reason the time spent in the decompressing chamber was not effective on the 22nd of June to make it safe

for the applicant to go out into the ordinary air pressure that the decompressing chamber on this day failed to be effective to safeguard the applicant, and he was of opinion that this failure constituted an accident within the meaning of the Workmen's Compensation Acts, and he made an award of compensation accordingly.

Did an accident within the meaning of the Workmen's Compensation Acts occur to the applicant on the 22nd day of June? In the case of *Fenton v. Thorley & Co., Ltd.* (1), it was held that in these Acts the word "accident" is used in its ordinary and popular sense as denoting "an unlooked for mishap or an untoward "event which is not expected or designed." See per Lord Macnaghten, at p. 448. In the same case at p. 451, Lord Shand says:—"Concurring as I fully "do in holding that the word 'accident' in the "statute is to be taken in its popular and ordinary "sense I think that it denotes or includes any unex- "pected personal injury resulting to the workman in "the course of his employment from any unlooked-for "mishap or occurrence," and Lord Lindley, at p. 453, says:—"the word 'accident' is not a technical legal "term with a clearly defined meaning. Speaking "generally, but with reference to legal liabilities, an "accident means any unintended and unexpected "occurrence which produces hurt or loss. But it is "often used to denote any unintended and unex- "pected loss or hurt apart from its cause; and if the "cause is not known the loss and hurt itself would "certainly be called an accident."

What happened to the applicant on this 22nd of June was undoubtedly an unlooked-for mishap and an untoward event, it was not designed but was it expected? A doctor thoroughly conversant with the nature of the disease and with the state of health and constitution of the man and all the circumstances of the case might have expected that the event which did happen would happen, but I do not think that any ordinary sensible man, knowing that the same precautions were taken on this day as on any other day,

(1) [1903] A.C. 443.

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and that the applicant had not hitherto manifested any ill-effects after decompression, could have had the same expectation.

In *Stewart v. Wilsons and Clyde Coal Co.* (1), Lord McLaren said:—"If a workman in the reasonable "performance of his duties sustains a physiological "injury as the result of the work he is engaged in . . . "this is an accidental injury in the sense of the "statute."

This statement of the law is referred to and adopted by the House of Lords in *Partridge Jones and John Paton, Ltd. v. James* (2).

Having regard to the meaning of "accident" as defined in these and other cases I entertain no doubt that the learned Recorder was justified in holding that the failure of the decompressing chamber on the date in question to safeguard the applicant from the onset of "Caisson Disease" was an accident within the meaning of the Workmen's Compensation Acts.

In these circumstances the question arises whether it was open to the Arbitrator to award compensation under section 1 (1) of the Act, or is the applicant debarred from having an award made by reason of his not having complied with the requirements of section 44?

"Caisson Disease" or compressed air illness is an industrial disease under section 44 and/or the orders made thereunder. Mr. McCoy for the respondents and appellants submits that on the true construction of sub-section (4) of this section, an applicant suffering from an industrial disease, even though such disease should not arise gradually but should be caused by accident within the meaning of section 1 of the Act, cannot recover under the latter section but must proceed according to the provisions of the former. Section 44 (4) of the Act provides that: "Nothing in "this section shall affect the rights of a workman to "recover compensation in respect of a disease to which "this section does not apply, if the disease is a personal "injury by accident within the meaning of this Act." This sub-section is identical with sub-section 10 of

(1) 5 F. (Ct. of Sess.) 120, 122. (2) [1933] A.C. 501, 506.

section 8 of the Workmen's Compensation Act, 1906. Sub-section (1) of this section for the first time brought within the scope of the Act certain industrial diseases and provided that the injury or death caused by the disease was to be treated as if it were personal injury or death caused by accident arising out of and in the course of the employment.

Between 1897 and 1906 a workman, or his dependants if he died, could recover compensation for injury arising from disease contracted by him if it could be proved that such disease was caused by accident arising out of and in the course of his employment. See *Brinton's, Ltd. v. Turvey* (1), in which the facts were that whilst a workman was employed sorting wool in a factory a bacillus, according to the medical evidence or theory, passed from the wool to the eye of the workman and infected him with anthrax of which he died ; his dependants were held to be entitled to recover compensation. Then came section 8 of the Act of 1906 which gave rights to the workman or his dependants in respect of disease due to the nature of his employment, though not referable to any occurrence which could be said to be an accident. Mr. McCoy's submission is that even if the learned Recorder were right in holding that the applicant's condition in this case is due to an accident, he is debarred from proceeding under section 1, the accident section, by reason of the proviso in sub-section 4 of the industrial disease section (44 of our Act). By construing the sub-section in this way the workman is put in a worse position as regards an industrial disease which can be clearly proved to arise from an accident than he was in before industrial diseases were dealt with in the Act of 1906. For between 1897 and 1906 compensation was payable in respect of such disease incurred in this way. The provisions of the Act of 1906, followed by those of the Act of 1927 in Northern Ireland, as regards industrial diseases, were inserted in case of the workman and I decline to hold that a sub-section which is intended to preserve the rights of a workman to recover compensation in respect of a

(1) [1905] A.C. 230.

C.A. 1933.

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disease to which the section does not apply, either (*a*) because it is not an industrial disease within the meaning of the Act or (*b*) because the conditions laid down in the earlier part of the section have not been or cannot be complied with, by implication takes away the workman's rights under section 1 of the Act in respect of industrial diseases to which the provisions of section 44 would ordinarily apply. This seems to be the view of the sub-section taken by those writers of text books who deal with the point and appears to be the view taken by Lord Hanworth, M.R., in the case of *Petchett v. Preis* (1), in which a barber suffered from dermatitis caused by a dry shampoo, and the Master of the Rolls, in giving judgment in the case, assumed that the disease from which the applicant was suffering was a scheduled disease. The workman had not proceeded under section 8 of the English Act of 1925 but under section 1 and the claim was dismissed, not because the provisions of section 8 were not invoked, but because there was no evidence establishing that an accident causing the disease had taken place as contended for by the applicant.

I have come to the conclusion that the decision of the learned Recorder was right and that the appeal should be dismissed with costs.

Solicitor for the appellants: *T. C. Wylie.*

Solicitors for the respondent: *Hugh C. O'Doherty & Son.*

J. McC.

(1) 31 T.L.R. 156.

THE ATTORNEY-GENERAL v. WALKER (1).

K.B.D. 1933.

Dec. 12.

(1933. No. 54.)

Revenue—Estate Duty—Assets consisting of shares in Company situate in Irish Free State—Testator and life tenant both domiciled in Northern Ireland—Situation of assets at death of tenant for life.

A testatrix, B.W., died domiciled in Northern Ireland. By her will she gave all her property to trustees to allow same to remain in the state of investment in which it might be at the time of her death or to change said investments as the trustees in their absolute discretion might think fit and to pay the income thereof to the testatrix's daughter, N.H., during her life, and after her death to hold the principal and income of the property in trust for the testatrix's grand-daughter, B.N.W.H., absolutely. She appointed W.E.W. and her daughter, N.H., executors of her will.

The assets included shares in a Company situate in the Irish Free State.

N.H., the life tenant, died on 23rd April, 1928, within two months of the death of B.W., and before representation to the estate of B.W. had issued.

A claim for estate duty arose on the death of N.H. in respect of the residuary estate of B.W. passing on the death of N.H. under the will, under section 1, of the Finance Act, 1894.

It was contended on behalf of the Crown that the residuary estate of B.W. as at the death of N.H. constituted a Northern Ireland chose in action, as B.W. died domiciled in Northern Ireland and the forum of administration of her estate was the Northern Ireland Courts.

The executor of the estate of B.W., however, contended that the estate of B.W. passed in specie on the death of N.H.

Held, by Brown, J., that after the death of B.W., N.H. had a proprietary interest in her mother's estate and that estate duty was payable in the Irish Free State and not in Northern Ireland, the residuary estate having passed on the death of N.H., and having consisted of shares in a Company, situate in the Irish Free State.

INFORMATION by the Attorney-General against Lieutenant-Colonel William Eric Walker, the executor of Barbara Walker, deceased, claiming that all property which passed on the death of Nora Hamley under the trusts of the will of her mother, Barbara Walker, was

(1) In the King's Bench Division before Brown, J.

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liable to estate duty to the extent of £81 13*s.* 7*d.*, together with interest thereon from 23rd April, 1928, amounting to £13 8*s.* 8*d.*, by an assessment of duty, dated 3rd June, 1932, and with the further sum of £3 9*s.* 11*d.* interest thereon from 3rd June, 1932, to 3rd July, 1933, making in all the sum of £98 12*s.* 2*d.*

Barbara Walker, who died on the 25th February, 1928, domiciled in Northern Ireland, by her will gave all her property to trustees "To allow same to remain "in the state of investment in which it may be at the "time of my (the testatrix's) death or to change said "investments as they in their absolute direction "may think fit, and to pay the income thereof to my "(the testatrix's) daughter, Nora Hamley, during "her life and after her death to hold the principal "and income of my said property in trust for my "grand-daughter, Barbara N. W. Hamley, absolutely." She appointed William E. Walker, who was domiciled in England, and her daughter, Barbara N. W. Hamley, executors of her will. The assets of Barbara Walker included (*inter alia*) 3,301 Preference shares and 4,341 Ordinary shares in Greenmount and Boyne Linen Co., Ltd., situate in the Irish Free State.

Nora Hamley, the life tenant, died within two months of the death of her mother, on 23rd April, 1928, before representation to the estate of Barbara Walker had issued.

A claim for estate duty arose on the death of Nora Hamley in respect of the residuary estate of Barbara Walker, passing on the death of Nora Hamley under the will, under section 1 of the Finance Act, 1894.

It was contended on behalf of the Crown that the residuary estate of Barbara Walker as at the death of Nora Hamley constituted a Northern Ireland chose in action, as Barbara Walker died domiciled in Northern Ireland, and the forum of administration of her estate was the Northern Ireland Courts.

It was contended, however, on behalf of the executor of the will of Barbara Walker, that the estate of Barbara Walker passed in specie on the death of Nora Hamley and that the shares in Greenmount and Boyne Linen Co., Ltd., so passed and were situate in the Irish Free State.

The *Attorney-General* (*Babington, K.C.*) (with him *Dougherty*) for the Crown :—

The question that arises is, what was the nature of the interest which passed? The estate of the mother, Barbara Walker, being unadministered at the date of the death of her daughter, Nora Hamley, what estate was it that Nora Hamley took upon the death of her mother ?

The Double Taxation Relief Act (Northern Ireland), 1923, provides that " where the Ministry of Finance " for Northern Ireland is satisfied that Estate Duty " is payable in the Irish Free State by reason of a " death of a person dying on or after 1st April, 1923, " in respect of any property situate in the Irish Free " State and passing on such death, that Ministry " shall allow a sum equal to the amount of that duty " to be deducted from the Estate Duty payable in " Northern Ireland in respect of that property on " the same death."

There were similar provisions " where the Revenue " Commissioners of the Irish Free State are satisfied " that Estate Duty is payable in Northern Ireland."

The residuary estate as at the death of Nora Hamley constituted a Northern Ireland chose in action as Barbara Walker died domiciled in Northern Ireland. The estate ought to be administered, in the jurisdiction where the person who owned it was domiciled.

Attorney-General v. Lord Sudeley (1), was a case where a testator died domiciled in England. By his will, after bequeathing various specific legacies, he devised and bequeathed one-fourth of the residue of his real and personal estate to his wife. His will was proved in England ; and while his estate was being administered there, and before the amount of the clear residue had been ascertained, the wife died. The husband's estate included money invested on mortgages of real property in New Zealand. These mortgages remained unrealized at the date of the wife's death, and no part of them had been appropriated to any particular shares of the ultimate residue.

(1) [1896] 1 Q.B. 354.

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The executors of the wife, in their affidavit made for the purpose of obtaining probate of her will, did not include her fourth share of the mortgage securities, and refused to do so, claiming that it was not liable to probate duty in this country.

It was held by Lopes and Kay, L.JJ. (Lord Esher, M.R., dissenting), reversing the judgment of the Queen's Bench Division, that the right of the executors of the wife not being to a share of the mortgage securities, but being a right as against the executors of the husband to have the estate administered, and to receive from them a fourth part of the residue, was an asset of the wife's estate, that its locality was English, and that its value was therefore subject to probate duty.

We submit that the words used by Lopes, L.J., in his judgment in *Attorney-General v. Lord Sudeley* (1), at page 363, are applicable to the present case.

The decision of the Court of Appeal was affirmed in the House of Lords (2), and in his speech in the House of Lords, Lord Halsbury, L.C., pointed out that "the "thing that the legatee was entitled to was one-fourth "share of a residuary estate, consisting, it may be, "of many things."

The decision of the House of Lords in *Lord Sudeley v. Attorney-General* (2), was followed in *In re Smyth, Leach v. Leach* (3).

In *Vanneck v. Benham* (4), it was held that the decisions in *Cooper v. Cooper* (5) and *Lord Sudeley v. Attorney-General* (2), are reconcilable on the ground that the interests of one of the next-of-kin in an intestate's estate, although sufficiently specific to raise a case of election representing as that interest does all the money's worth of the property comprised therein, is not sufficiently specific, apart from agreement with the other next-of-kin, where there are more than one, to enable any one of them to claim as his own any particular article from the administrator.

(1) [1896] 1 Q.B. 354.
(2) [1897] A.C. 11.
(3) [1898] 1 Ch. 89.
(4) [1917] 1 Ch. 60.
(5) L.R. 7 H.L. 53.

Tevlin v. Gilsenan (1), in effect followed *Cooper v. Cooper* (2).

The only right that existed was to bring proceedings for administration against the administrator.

We submit that this residuary estate constitutes a Northern Ireland chose in action, and that duty is properly payable in Northern Ireland.

Jurisdiction depends upon the domicile of the person whose estate is being administered.

[He also referred to *Rex v. Commissioners for Special Purposes of Income Tax Acts* (3).]

Warnock, K.C. (with him *Curran*) for the defendant:

This is an attempt to enforce the payment of double duty. Estate duty has already been paid in the Irish Free State. We contest the proposition that a gift of residue and a universal gift are the same.

Lord Sudeley v. Attorney-General (4), has never been relied on except where there is an unascertained and unascertainable residue. In that case none of the beneficiaries had in themselves a right of ownership in particular assets.

Lord Sudeley v. Attorney-General (4), has only been cited as an authority in cases dealing with unascertained residue.

Cooper v. Cooper (2), is a decision of unchallenged authority, it stands to-day as clearly the law of this country.

In *Vanneck v. Benham* (5), Younger, J., referring to the distinction between *Cooper v. Cooper* (2), and *Lord Sudeley v. Attorney-General* (4), said: "But I "think it is not difficult to arrive at the true dis- "tinction between the two lines of authority which "at first sight may seem to be in conflict. The dis- "tinction, it appears to me, is that an interest in an "intestate's estate is sufficiently specific to raise a "case of election, representing as that interest does "all the money's worth of the property comprised

(1) [1902] 1 I.R. 514.
(2) L.R.7 H.L. 53.
(3) [1920] 1 K.B. 468.
(4) [1897] A.C. 11.
(5) [1917] 1 Ch. 60, 76.

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"therein, but, that interest is not sufficiently specific, "apart from agreement with the next-of-kin where "there are more than one, to enable any one of the "next-of-kin to say to the administrator:—'This or "'that thing is mine. Hand it over to me.'"

Rex v. Commissioners for Special Purposes of Income Tax Acts (1), is of no assistance in the present case.

The executor derives his title from the will and not from the probate.

There is nothing in common between *Lord Sudeley v. Attorney-General* (2), and *Cooper v. Cooper* (3). In *Cooper v. Cooper* (3), Lord Cairns, L.C., in his speech in the House of Lords said:—"For the benefit of "creditors, and for the facility of division among the "next-of-kin, the estate is to be turned into money, "but as regards substantial proprietorship the right "of the next-of-kin remains clear to every item "forming the personal estate of the intestate, subject "only to those paramount claims of creditors."

In the same case Lord Hatherley, in dealing with the acquiring of a distinct interest in a particular chattel, said: "Yet I take it that, whether it was a term of "years, whether it was the produce of a sale, or whether "it was any other specific chattel belonging to the "intestate's estate, if there were a sole next-of-kin he "could, by paying the debt of the intestate and satis-"fying the funeral and testamentary expenses, require "that property should not be sold and disposed of, "and it would then become his alone, entirely and "absolutely, in possession."

[He also referred to *Attorney-General v. Johnson* (4), *Inland Revenue Commissioners v. Hawley* (5), *In re Pearce, Crutchley v. Wells* (6).

The *Attorney-General* (in reply):—

Cooper v. Cooper (3), did not deal with the question raised in the present case.

(1) [1920] 1 K.B. 468.
(2) [1897] A.C. 11.
(3) L.R. 7 H.L. 53, 65.
(4) [1907] 2 K.B. 885.
(5) [1928] 1 K.B. 578.
(6) [1909] 1 Ch. 819.

The question is, is the estate ascertained? In all the cases that have been referred to, and also in the present case, the estate is not ascertained.

I submit in law and in principle the property is vested in the personal representative.

BROWN, J.

BROWN, J.: This is an important case. If the amount at issue were larger, the question might have gone for final determination before the highest court in the realm.

[Having stated the facts, Brown, J., continued.] The question for decision is, what property did Nora Hamley take in her mother's estate?

The claim of the Crown is for the recovery of £98 12*s.* 2*d.* for estate duty and interest, and £2 1*s.* 6*d.* costs, making a total of £100 13*s.* 8*d.*

It was contended on behalf of the defendant that the estate of Barbara Walker passed in specie on the death of Nora Hamley and that the shares in the Greenmount and Boyne Linen Company, Limited, a company situate in the Irish Free State, so passed.

If that view were correct, it would be necessary for the Ministry of Finance for Northern Ireland to allow a sum equal to the amount of the estate duty payable in the Irish Free State to be deducted from the estate duty payable in Northern Ireland under the Double Taxation Relief Act (Northern Ireland), 1923.

The Attorney-General submitted that the residuary estate of Barbara Walker as at the death of Nora Hamley constituted a Northern Ireland chose in action, as Barbara Walker died domiciled in Northern Ireland.

A number of cases have been referred to.

In *Cooper v. Cooper* (1), a very similar question came before the House of Lords for consideration.

In that case, in his speech in the House of Lords, Lord Cairns, L.C., said: "No doubt the right of a next-"of-kin is a right which can only be asserted by calling "upon the administrator to perform his duty, and the "performance of the duty of the administrator may "require the conversion of the estate into money for "the purpose of paying debts and legacies. But I

(1) L.R. 7 H.L. 53.

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"apprehend that the rule of law, or the rule laid down "by statute, which requires the conversion of an "intestate's estate into money, is a rule introduced "simply for the benefit of creditors and for the facility "of division. For the benefit of creditors, and for "the facility of division among the next-of-kin, the "estate is to be turned into money, but as regards "substantial proprietorship the right of the next-of-"kin remains clear to every item forming the personal "estate of the intestate subject only to those para-"mount claims of creditors."

In this passage Lord Cairns is dealing with the very point submitted for decision in the present case.

That was a remarkably strong statement of the Lord Chancellor.

That decision of the House of Lords in *Cooper v. Cooper* (1), still stands. The effect of it is that the next-of-kin have a substantial proprietary interest in a residuary estate.

I do not think that *Lord Sudeley v. Attorney-General* (2), clashes with *Cooper v. Cooper* (1).

In *Lord Sudeley v. Attorney-General* (2), as was pointed out by Lord Herschell, it would not be possible to say: "that any one of the residuary legatees could "point to any part of the assets of the testator and "say 'this is a part of my estate,' when it depends "entirely on the method of administration by the "trustees in what form the residue becoming divisible "will exist when the administration is at an end."

That difficulty does not arise in the present case, to which I am of opinion *Lord Sudeley v. Attorney-General* (2), does not apply.

The concluding words of Lord Shand's speech in the House of Lords in *Lord Sudeley v. Attorney-General* (2), show the distinction between that case and the present.

In that passage, he said: "If Mr. Tollemache's "executors had held the entire estate for behoof of his "widow the case might have been different, but with "other persons' interest in an undivided and un-"realized residue none of the beneficiaries had in

(1) L.R. 7 H.L. 53. (2) [1897] A.C. 11, 20.

"themselves a right of ownership in particular assets "of Mr. Tollemache's estate."

I need not refer to *Rex v. Commissioners for Special Purposes of Income Tax Acts* (1).

I am satisfied that after the death of Barbara Walker, her daughter, Nora Hamley, had a proprietary interest in her mother's estate, and that estate being situated in the Irish Free State, estate duty was payable in the Irish Free State and not in Northern Ireland.

Judgment must be given for the defendant with costs.

Solicitor for the Crown: *J. H. B. Gunning.*

Solicitors for the defendant: *Hamill, Davison & Wilson.*

J. McC.

(1) [1920] A.C. 468.

Land Judge. 1933.

Oct. 31. Nov. 21.

IN THE MATTER OF

THE LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891, AND OF ROBERT JAMES WATTERS, a registered owner of land.

Folios 172, 2372 and 1437. Co. Tyrone.

Local Registration of Title—Registered Owner—Land Certificate—Deposit by way of Equitable Mortgage—Subsequent charge—Refusal of Depositee to produce Land Certificate—Note of Lien in Register—Practice under Local Registration of Title (Ireland) Act, 1891 (54 *&* 55 *Vict., c.* 66), *ss.* 29, 31, 36, 44, 45, 47, 49, 69, 70, 81—*Land Registry Order IV, rr.* 20, 21 ; *Order VIII, rr.* 1 *&* 2 (3)—*Land Transfer Acts*, 1875 *and* 1897—*Land Registration Act*, 1925.

On 28th March, 1931, W., the registered owner of the lands comprised in Folios 172, 2372 and 1437, deposited the original land certificates relating thereto, with the appellant Bank as security for his current account. No writing accompanied the deposit. On 22nd October, 1932, W. executed in favour of F. a deed of charge on the lands contained in the said folios as the security for a loan. F. in due course, applied to have the charge registered in all the said folios. The appellants refused to produce the said land certificates unless their lien was secured by a note entered in the Register, evidencing their claim.

This the Registrar refused to do on the ground that to do so was contrary to the practice of the Land Registry in Northern Ireland.

On a subsequent application by F., the Registrar ordered that the said land certificates be lodged in the office of the Land Registry within 14 days. The Bank appealed from these two orders.

Held, by Megaw, J., that the priority of the appellants' charge created by the deposit of the land certificates would remain unimpaired by being lodged in the Land Registry.

Held also, that on the request of the appellants a note of their charge should have been entered in the said folios by the Registrar.

Appeals to the Land Judge from two orders of the Registrar of the Land Registry. The first, dated 5th July, 1933, refusing an application to enter a note in Folios Nos. 172, 2372 and 1437 County Tyrone, of the

existence of an equitable mortgage of the appellants upon the lands included in the said folios. The second order appealed from was dated 16th October, 1933, and directed the appellants to lodge the land certificates relating to the same folios for the purpose of entering thereon a charge to which the appellants were not a party, an order necessary to give effect to the earlier order.

Robert James Watters was on 4th November, 1930, registered as owner of the lands in the said folios. The folios all related to lands which were subject to compulsory registration under the Local Registration of Title (Ireland) Act, 1891, and were registered subject to equities.

On 28th March, 1931, Watters deposited the original land certificates relating to the lands in the said folios with the Hibernian Bank as security for his current account. No writing accompanied the deposit. On 22nd October, 1932, Watters executed a deed of charge on the lands included in the said folios with others to secure a loan of £1,200 with interest at five per cent. in favour of one Alexander Ferguson, who in due course applied to have the charge registered in all the folios comprising the lands mentioned in them. Application was made to the appellants to produce the land certificates for the purpose of having this charge registered. This the appellants refused to do, fearing they might lose the statutory charge or lien given by the certificates, unless a note was entered in the Register evidencing their claim as equitable mortgagees. An application was made to the Registrar of Title by the appellants that an entry should be made on the Register of the equitable mortgage or lien created by the deposit of the original land certificates relating to the lands comprised in them respectively.

On 5th July, 1933, it was ordered as follows:—
"It appearing that the making of such an entry is "contrary to the practice of the Land Registry in "Northern Ireland and the Registrar not being "satisfied that it is competent to him to cause "such an entry to be made on the Register, the "Registrar doth order that the said application be "and is hereby refused."

Land Judge. 1933.

IN THE MATTER OF THE LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891, AND OF ROBERT JAMES WATTERS.

On 16th October, 1933, the Land Registry made the second order appealed from, which, pursuant to section 81 of the Local Registration of Title (Ireland) Act, 1891, ordered the appellants to lodge the various land certificates in the Office of the Registry within fourteen days.

The Hibernian Bank appealed from these two orders.

Murphy, K.C. (with him *Chambers*) for the appellants referred to the Local Registration of Title (Ireland) Act, 1891, sections 45 (*m*), 47, 44 (2) and (3), 69, 70, 49, 36 and 81 (3) and (5). In *Tench v. Molyneux and Others* (1), Holmes, L.J., said: "what was meant by "'subject to any registered rights' was that a right "which would have been puisne to that created by the "deposit before the Act would not be so if it was "registered. In fact so far from extending the "equitable consequences of the deposit it limited "them in cases where other rights, which under the "previous law would be puisne, were registered." [He also referred to Glover's Registration of Ownership of Land in Ireland, 1933 Edition.]

McCoy for Alexander Ferguson.

Cur. adv. vult.

MEGAW, J.

MEGAW, J.: Two notices of appeal have to be considered by the Court with regard to the security of the appellants over certain registered lands contained in three folios of the County Tyrone Register, viz., Folios Nos. 172, 2372 and 1437.

The first appeal is from the order of the Registrar dated 5th July, 1933, refusing an application to enter a note in these folios of the existence of an equitable mortgage of the appellants upon the lands included in the folios.

The second appeal is from an order of the Registrar dated 16th October, 1933, directing the appellants to lodge the land certificates relating to the same folios for the purpose of entering thereon a charge to which

(1) 48 I.L.T.R. 48, 55.

the appellants were not a party, an order which was necessary to give effect to the earlier order.

These appeals involve questions of very great importance—the more so by reason of the fact that the great bulk of the land in Northern Ireland, being sold under the Land Purchase Acts, has become subject to compulsory registration under the Local Registration of Title (Ireland) Act, 1891. I may preface my judgment by saying a word or two as regards the system of Land Registration.

For a very considerable time a desire has been felt that some method should be devised for better facilities for the transfer of land, not only to avoid defects of title in the case of purchasers and chargeants, but also to enable prospective purchasers or lenders of money on land security to see that the title of the vendor or borrower is, without having to resort to an elaborate investigation and perusal of documents.

In Ireland since the time of Queen Anne the system of a Deeds Registry has been in force, but this was adapted to protect dealers in land against fraud rather than to give facilities for learning the title. In England in 1875, by the Land Transfer Act, provision was made for voluntary Registration of Title. Its provisions furnished very important precedents for our own Local Registration of Title Act, 1891. The Land Transfer Act has been extended and modified in England by two very important statutes, viz., the Land Transfer Act, 1897, and the Land Registration Act, 1925.

This English legislation is well worthy of study, as it marks the various steps in a policy which seems to aim ultimately at universal registration of title to lands, so that from public records one can know what is the state of the title to any particular land. Publicity is really at the root of the policy, and in construing the Acts and their somewhat complicated provisions, this should not be overlooked. It is clear that the general intention of the Registration Acts is that the recorded title appearing on the public records shall not be subject to being prejudiced by dealings that are not recorded thereon. This was

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clearly recognised by Lord Davey in *Fullerton v. Provincial Bank of Ireland* (1), when referring to the well-known case of *In re Burke* (2), which recognised priority of a mortgage created by deposit of title deeds without accompanying memorandum over subsequently registered instruments. He said with regard to the decision in that case at p. 314: "My "Lords, it might appear to some people that the "policy of the Irish Registration Act (*sic*) was to "postpone an unregistered transfer of property to a "registered one, whether the non-registration arose "from negligence or inadvertence or from the fact "of the transfer having been effected without any "document being executed which was capable of "being registered. I must express my personal regret "that it was not so held." I think Lord Lindley's language in the same case acquiesced in Lord Davey's expression of opinion.

The development of English legislation has been guided by the experience obtained by the lengthy administration of what was a voluntary system; and one can see how, in the last Act of 1925, matters which previously might have been doubtful as depending on rules have been expressly sanctioned by the Legislature.

I had hoped to be able, through a comparison of the English Registry Acts and Rules, to get assistance in coming to a conclusion in the appeals before me. The English Land Transfer Act of 1875, the only legislation of the kind existing at the date of the Local Registration of Title (Ireland) Act, which was largely resorted to as the basis of the Irish legislation, has been so amended by the subsequent Acts—the Land Transfer Act, 1897, and the Land Registration Act, 1925—that it would now be misleading to lay any great stress on the procedure based on these enactments. In particular, the English registering authorities now have a system of entering notices on the Register which is based on sections of the 1925 Act which have no counterparts in the Local Registration (Ireland) Act. These notices were in practical

(1) [1903] A.C. 309. (2) 9 L.R.I. 24.

use under the Rules before they were expressly recognised in legislation, and I think that the precedent may be usefully applied in framing rules under our own Act, to which I shall subsequently refer.

So far as Northern Ireland is concerned, the law is the same as it was in 1891, and I find that in fact in some cases no statutory rules have been made during all that period under sections which expressly required them. Perhaps the most striking examples of this are to be found in the case of section 81 of the Local Registration of Title Act, with which the present appeals are so much involved. The omission has been vigorously commented on by Mr. Glover in his valuable work on Land Registration in Ireland published a few months ago, and I venture to hope that this matter may soon be remedied. As regards the matters now at issue in the present appeal, while there has been a consistent procedure observed by the Registry authorities, there has been no judicial pronouncement that is really relevant.

The facts giving rise to the appeal are as follows :— One Robert James Watters was the Registered Owner of the lands in the various folios. The folios all related to lands which were subject to compulsory registration under the Local Registration of Title (Ireland) Act, 1891, and in all cases the registration contained the note that the lands contained in the folio were registered subject to equities.

The date of the registration of Watters in all the folios was 4th November, 1930.

On 28th March, 1931, Watters deposited the original land certificates relating to the lands in these folios with the Hibernian Bank as security for his current account. No writing accompanied the deposit. On 22nd October, 1932, Watters executed a deed of charge on the lands included in these folios with others to secure a loan of £1,200 with interest at five per cent. in favour of one Alex. Ferguson, who in due course applied to have the charge registered in all the folios comprising the lands mentioned in them. The appellants were communicated with as regards the production of the land certificates for the purpose

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of having this charge registered, but they, fearing that they might lose the statutory charge or lien given by the certificates, declined to do so unless a note was entered in the Register evidencing their claim as equitable mortgagees. The appellants were apprehensive that by Section 49 of the Local Registration of Title Act they would lose their priority over Ferguson's charge. The Registry authorities, however, had adopted the practice of not entering any such charge by deposit only, when unaccompanied by a note in writing, and from the first there seemed little prospect of the registration of the charge.

After some correspondence between Ferguson and the appellants in regard to the production of the certificates, an application was made to the Registrar of Title by the appellants that an entry should be made on the Register of the equitable mortgage or lien created by the deposit of the original land certificates relating to the lands comprised in them respectively. This application was finally disposed of on 5th July, 1933, when an order was made, the crucial part of which was :—

> " It appearing that the making of such an entry " is contrary to the practice of the Land Registry " in Northern Ireland and the Registrar not being " satisfied that it is competent to him to cause such " an entry to be made on the Register the Registrar " doth order that the said application be and is " hereby refused."

Time for the notice of appeal was extended to 23rd October.

On 16th October the Land Registry made the second order appealed from, which, pursuant to section 81 of the Local Registration of Title Act, ordered the appellants to lodge the various land certificates in the office of the Registry within fourteen days.

From these orders the Hibernian Bank have appealed.

There are two matters, consequently, that have to be determined by the Court, viz. :—

(1) Whether the charge or lien created by the deposit of the land certificate is affected as

regards priority by its production to the registering authority, and the entry on the folio and land certificate of a subsequently executed registered charge, without any note appearing on the folio and land certificate of the charge or lien created by the deposit?

(2) Whether, if the depositee of the land certificate retains his priority notwithstanding the production of the deed, he, the person producing the certificate under the order of the registering authority, is entitled to have a note of his charge entered on the folio and certificate?

Both questions are concerned with the procedure by which the right created by section 81 (5) of the Local Registration of Title (Ireland) Act, 1891, can be protected and given effect to. The right is that the deposit of the certificate shall, for the purposes of creating a lien on the registered land, have the same effect as a deposit of the title deeds of land would have had prior to the Act. Naturally this requires the consideration of what the effect of a deposit of title deeds prior to the Act was.

When one looks into the authorities, it would seem that a deposit of title deeds before the Act did not, properly speaking, constitute a possessory lien, but was regarded by the Courts as evidence of an agreement to create a legal mortgage. This was recognised by Stirling, J., in *Re Owen* (1), where he says: "It is "settled that the relief to which an equitable mort- "gagee by deposit of title deeds is entitled is fore- "closure and not sale—the reason appears to be that "the Court treats the deposit as evidence of an agree- "ment to create a legal mortgage."

However, it never has been determined by the Courts, either in Ireland under the Local Registration of Title Act, or in England under the Land Transfer Acts, whether the right created is affected as regards priority by the actual registration of a subsequently constituted charge in the Registry. The English Land Registration Act, 1925, section 65, shows by

(1) [1894] 3 Ch. 220, 227.

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implication, at any rate, that a mortgage by deposit is capable of registration, and section 66 makes very elaborate provisions as to the effect of a deposit of the land certificate. In our Registry, before the registration of a charge can be registered, it is necessary that the land certificate be forthcoming, and a doubt has long been felt whether the parting for the time being of the land certificate under the order of the registering authority for the purpose of registering a subsequent charge will affect the priority of the depositee's charge without the entry of a note of the deposit in the Land Registry. The first appeal raises the question whether an entry of a note on the Register *may* be made of a charge by deposit of the certificate.

Section 29 (3) of the Act provides for the making of a note on first registration where compulsory registration is enforced and the title to the land is not investigated, the object being to preserve intact any pre-existing rights and equities. I have not been able to find any other statutory provision for making notes on the Register, and apparently it has been against the practice of the registering authorities to make any other entries in the form of notes, though in the Rules Order VIII, rule 2 (3) (*d*) provides that every certificate issued in respect of a burden shall contain " such notes and other matters as the Registrar " may deem necessary."

It seems convenient to take the two appeals together as the questions arising in them are interdependent.

The consideration of the points at issue demand a review of sections of the Local Registration of Title Act, both as regards the land certificate and the effect of its deposit and also sections dealing with priority of incumbrances or burdens, and the conditions regarding the production of the land certificate.

Section 31 of the Act provides that, on the registration of a person as owner of land, the registering authority shall deliver to him a certificate in the prescribed form of his title to the land. This certificate is referred to throughout the Act as the " land certi- " ficate." The existing rules under the Act, Order

VIII, r. 1, require that every land certificate shall show the existing state of the title at the date of its issue, including the description of the lands, the nature of the ownership, *and the burdens* affecting the same. Rule 2 (3) proves that "Every certificate issued in "respect of a burden under the Act shall contain—

"(*a*) particulars of the name, address and descrip-
"tion of the registered owner of the burden;
"(*b*) particulars of the nature of the burden, in-
"cluding, in the case of money charges, the
"principal money secured and the rate of
"interest;
"(*c*) description of the lands charged;
"(*d*) all burdens entered on the Register;
"(*e*) such notes and other matters as the Registrar
"may deem necessary."

As burdens registrable are defined by the Act, I presume that the meaning of burdens in the Rules is confined to such burdens as are required to be registered under the Act or burdens of a like character. It is clear that the rule does not contemplate restrictions of entries to the burdens actually mentioned in the Act, as in clause (*e*) we have the words "such notes "and other matters," no doubt ensuring by these general words that entries may be made which will comply with the rule that the certificate shall show the existing state of the title at the date of its issue.

Apparently Order VIII has been interpreted as referring only to first registration, and where there has been a charge on lands by deposit of title deeds prior to first registration, the registering authority does make a practice of entering the charge so created on the register as a burden—why it has drawn the line at the first registration and declined to apply the same principle to the registration of the charge created by the deposit of the land certificate itself is not quite clear to me, but I have not had the advantage of any argument on behalf of the registering authority.

Section 44 is one of very considerable importance. By it the registered owner of registered land alone is entitled to transfer or charge the land, and sub-section 2 of the section provides that, after the first registra-

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tion, no right created or arising in relation to the land shall affect a registered transferee of the land or charge thereon for valuable consideration unless the right is either registered as a burden affecting the land or is one of the burdens to which, though not registered, all registered land is by the Act declared to be subject, while sub-section 3 provides for the protection of rights by cautions and inhibitions. Great stress was laid upon the provisions of this section by counsel for the appellants, and undoubtedly its terms are such as would justify the fears of the holders of any unregistered charge.

Section 45 of the Act sets out in sub-section 1 the burdens that may be registered under thirteen heads—the thirteenth being "any such other matter as may "be prescribed."

Sub-section 2 of that section provides: "A burden "may be registered under this section on the applica- "tion of the registered owner of the land, or of any "person entitled or interested in the burden, but if the "application is made without the concurrence of the "registered owner of the land or such other concur- "rence as may be prescribed, the burden shall not be "registered except in pursuance of an order of the "Court."

Now in the statutory rules made under the Act, Order IV, rule 20, prescribes that "it shall be com- "petent for the Registrar to register as burdens "affecting registered land such matters as, in addition "to the burdens specified in section 45 of the Act, "may appear to him properly to charge or affect the "registered land," while the following rule 21 prescribes as to the concurrence of the registered owner, express or presumed, after service on him of notice of the transaction.

Taken in conjunction with Order VIII, rule 2 (3) (*e*), these rules *prima facie* would show a strong case for either registering or noting a charge such as the appellants'.

The burdens which affect registered lands, whether they are registered or not, are set out in section 47 and it seems manifest that the appellants' security

does not come within the express terms of the section.

Section 49 deals with priority. This section creates very strong misgivings on the part of the appellants in the present case.

So far as registrable and registered burdens on the folio appearing on the land certificate are concerned, no difficulty can arise, but the security of the appellants depends on a transaction as to which there is some obscurity. That security has its origin in section 81 of the (Local Registration of Title) Act, which, under sub-section 5, defines the extent of the security to which I referred in my preliminary remarks, and under sub-section 2 gives power to make an order in certain circumstances for the production of the Land Certificate.

Sub-section 5 enacts: "Subject to any registered "rights the deposit of a land certificate or certificate "of charge shall, for the purpose of creating a lien on "the land or charge to which the certificate relates, "have the same effect as a deposit of the title deeds "of land or of a charge thereon has heretofore had."

This corresponds in substance with the Land Transfer Act, 1875, section 81—the Statute which was in force in England when the 1891 Act passed but which was repealed and re-enacted in different language by section 8, sub-section 6, of the Land Transfer Act, 1897, and section 66 of the Land Registration Act, 1925. While the two later Acts progressively make more stringent the provisions protecting incumbrances affecting registered land prior to the issue of the land certificate, they certainly do not give any greater weight to a subsequently registered charge.

Hitherto from the institution of the Land Registry, as I have said, the practice has been to make no reference on the folio to such charge or lien arising from the deposit of the land certificate, it being assumed that the wording of this section preserves the priority of the charge or lien irrespective of its entry on the Register—possibly on the analogy of the priority given in the Deeds Registry to an equitable mortgage arising from mere deposit of deeds, to which I have already referred.

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We are confronted, therefore, with a series of somewhat inconsistent factors, and we must reconcile them as far as possible.

Whether coming under the category of burdens mentioned in section 45 (1) of the Act or not, the charge created by section 81 (5) is an incumbrance in a very real sense, and whether it may properly fall under sub-head (*m*)—(" any other such matter as may " be prescribed ")—of that section or not, it vitally affects the state of the title. Indeed, had section 81 (5) in the Act found its place before section 45, it would undoubtedly have come under the registrable burdens, as sub-section (*b*) of that section makes " any change " on the land created in pursuance of the foregoing " provisions of this Act after the first registration of " the land " a burden capable of registration. Can the fact that the effect of a deposit being made a charge by a later section render it not properly registrable while it would have been necessarily registrable had the section been numbered 44 instead of 81 ?

Whatever the answer to that question may be, I am of opinion that, as matters stand at present, the registration of such a charge may properly be a prescribed matter under section 45 (1) (*m*) so as to carry out the policy and probably the requirements of the Act. Rules, however, should place the question as far as possible out of the region of controversy.

Having given the best consideration I can to the sections of the Act I have referred to, and the statutory rules, I have, with considerable doubt, come to the conclusion, as regards the first question I have mentioned as calling for decision, that the priority of the charge created by the deposit of the land certificate would, so far as that particular land certificate is concerned, remain unimpaired, both as to the amount of money secured and as to its priority after its production to the registering authority under their order, notwithstanding the registration of the subsequent charge for the registration of which they ordered the production of the land certificate. I cannot see how section 81 (3) of the Act would be operative if this were not so. That sub-section seems clear and unambiguous. It

enacts that the production of the certificate under the order " shall not affect the lien of any person thereon." If it were postponed it certainly would, if language has any meaning, be seriously affected. I do not think that the language of Holmes, L.J., in *Tench v. Molyneux* (1), referred to by Murphy, is an authority to the contrary. The learned Lord Justice evidently referred to rights existing before the deposit was made. Indeed, if I had to decide that priority would be lost, I should be slow to hold that sub-section 2 of section 81 would have applied, inasmuch as in such circumstances the subsequent dealing with the registered land could not equitably or properly be made without the consent of the person having custody of the land certificate, and this is a condition precedent to the order issuing, but when one reads section 81 (1), it appears that the land certificate may either be cancelled or so altered as to be brought into conformity with the Register, in which latter case, of course, the subsequently registered charge would appear, and if this did appear without reference to the charge by deposit it would be a misleading document. If cancelled, a new certificate should be issued and, before the issue of the certificate, there should be the note required by Order VIII, 1. It follows, therefore, that to give administrative effect to the lien, there should be a note of the deposit. This really answers the second question, and I have come to a clear conclusion that, on the request of the appellants, a note of their charge should have been entered on the folio.

The sections and the rules I have referred to in my opinion make it not only possible, but highly proper, and if the policy of the Act is to be carried out, imperative that a note of the charge should be entered on the folio and on the certificate.

I can see no logical reason for instituting a different system in respect of the charge constituted by the deposit of title deeds before first registration and the charge created by the deposit of the land certificate afterwards.

Order IV, rule 20, also would be very much impaired in its effect if I were to hold otherwise, and, to my

(1) 48 I.L.T.R. 48, 55.

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mind, the provisions of section 45 on their face invite the entering of a note on the Register setting out the the existence of the statutory lien. That notes may properly be entered on the Register in matters of this nature seems to follow from Order VIII, rule 2 (3) (*e*).

I can well understand the reluctance of the registering authority here to venture on exercising powers that had been so long left in abeyance and to institute a new practice. I know that they have desired and welcomed a decision of the Court on these matters. Under the Land Transfer Acts, 1875 and 1897, the corresponding registering authorities in England seem to have followed a recognised practice of entering a note on their Registers whether the new charge created after the deposit was to take priority or be postponed to the charge by deposit.

At present a very elaborate system of rules with regard to notices of such deposits and the issue of certificates when such notices have been given form part of the existing English code of Rules under the Land Registration Act, 1925.

In my opinion, the entry of such a note on the Register as was asked for by the appellants would enhance the advantages to be obtained from the system of Land Registry, and I think that the provisions of the Act give the Registrar power to make such entry and that it ought to be made.

Solicitor for the appellants: *James Fitzgerald.*

Solicitors for Alexander Ferguson: *Venables, Byers & McGarvey.*

J. R.

The following statutory rule and order, 1934, No. 84, Land Registration, Northern Ireland, Local Registration of Title, dated March 27, 1934, made by the Land Judge with the approval of the Lord Chief Justice of Northern Ireland amending the rules of September 1, 1910, was made in consequence of this decision :—

Order VIII: Rule 5.

(1) Any person with whom a Land Certificate or Certificate of Charge is deposited as security for money may give notice of such deposit in the form No. 43 to these rules annexed to the Local Registrar of Titles of the County, in which the lands referred to

in such Certificate are situate, and shall lodge with such notice the said Land Certificate or Certificate of Charge.

(2) On receipt of such notice, notice of the deposit shall be entered on the Register and the Land Certificate or Certificate of Charge (as the case may be) when brought into conformity with the Register shall be returned to the person with whom it was deposited.

(3) The Order to be served upon any person pursuant to Section 81 Sub-section (2) of the Act shall be in the form No. 45 to these rules annexed and on lodgment of a Land Certificate or Certificate of Charge as required by the said Order subject to any lien, which, the person in whose custody the Certificate may be, may claim notice of such lien may be entered on the Register and upon such lien being so entered the Land Certificate or Certificate of Charge (as the case may be) when brought into conformity with the Register shall be returned to the person with whom it was deposited :

Provided however that such notice of the deposit shall not be entered on the Register or the Certificate until ten clear days after notice in Form No. 44 to these rules annexed shall have been served upon the registered owner of the lands or charge to which the Land Certificate or Certificate of Charge relates.

(4) On receipt of the consent in Form No. 46 to these rules annexed the entry of the notice of such deposit shall be cancelled on the Register and Land Certificate or Certificate of Charge (as the case may be).

R. D. Megaw, Land Judge.

Approved.

William Moore, L.C.J.

K.B.D. 1933.

REX (MACKIN) v. THE JUSTICES OF COUNTY ARMAGH (1).

Dec. 4.

Summary Jurisdiction—Justices—Information originally sworn subsequently Summons issued—Whether Crown entitled to withdraw Information and proceed on Summons—Customs Consolidation Act, 1876 (39 & 40 *Vict.*, *c.* 36), *sections* 186, 197, 221, 224, 232, 233.—*Arrest.*

The prosecutor was arrested on 26th August, 1933, and charged with being unlawfully and knowingly concerned in the illegal importation of cattle, contrary to the Customs Consolidation Act, 1876. He was remanded on bail until the 11th September, 1933. An order was made on the 11th September, 1933, adjourning the trial until the 9th October.

An information was sworn on the 4th October, 1933, by an officer of Customs and Excise in which it was charged that the prosecutor was knowingly concerned in an attempted evasion of customs duty on cattle imported from the Irish Free State into Northern Ireland with intent to defraud the Revenue.

A summons, dated the 4th October, 1933, to attend on the 9th October, 1933, was issued against the prosecutor in pursuance of the information. The prosecutor attended at the Petty Sessions Court to answer the charge for which he had been arrested, when it was stated by the solicitor who appeared for His Majesty's Customs and Excise that he would withdraw the original charge and proceed on foot of the summons.

It was contended on behalf of the prosecutor that as he had been detained and charged on the 26th August, a summons could not subsequently be issued against him, in respect of the same offence.

A point was made on behalf of the prosecutor that as the summons had been served late, there had been no opportunity to consider the legal position. The chairman of the Court said that the best thing to do was to remand the prosecutor on bail. The solicitor for the prosecutor objected and maintained that as the charge under which he was arrested was withdrawn, he was free to walk out of the Court. The prosecutor then attempted to leave, but was arrested and detained in Court.

The solicitor for the prosecutor then withdrew from the case and the Court heard the summons and convicted the prosecutor of the offence charged and adjudged that he should pay the sum of £269 6*s.* 6*d.* or in default be imprisoned for six months.

(1) In the King's Bench Division before Moore, L.C.J., and Brown, J.

Held by the King's Bench Division, (Moore, L.C.J., and Brown, J.), that the procedure adopted was perfectly regular, and that the Court had power to elect, right up to the time of conviction, whether to proceed on information or on summons.

CERTIORARI.

The prosecutor, Vincent Mackin, was arrested on 26th August, 1933, and charged with being unlawfully and knowingly concerned in the illegal importation of seven head of cattle contrary to the Customs Consolidation Act, 1876. He was remanded on bail until Newtownhamilton Petty Sessions on 11th September, 1933.

An Order was made on the 11th September, 1933, adjourning the case against the prosecutor to Newtownhamilton Petty Sessions on the 9th October.

An information was sworn on the 4th October, 1933, by William Nesbitt, one of His Majesty's Officers of the Customs and Excise, that the prosecutor was knowingly concerned in an attempted evasion of a duty of Customs on seven cattle imported from the Irish Free State into Northern Ireland with the intent to defraud His Majesty of the duties thereon, contrary to the Customs Consolidation Act, 1876, and praying that the prosecutor might be summoned to make answer and defence to the charges against him.

A summons, dated the 4th October, 1933, to attend on the 9th October, 1933, at Newtownhamilton, was issued against the prosecutor in pursuance of the information and the summons which purported to be served on the 7th October, 1933.

The prosecutor attended at the Court House, Newtownhamilton, in pursuance of the Order, dated the 11th September, 1933, to answer the charge for which he had been arrested on the 26th August, 1933. The solicitor for the Customs and Excise stated at the hearing that he would withdraw the original charge and would proceed on foot of the summons.

The solicitor for the prosecutor, when the original charge had been withdrawn, contended that the prosecutor could not be brought before the Court on the summons.

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The solicitor for the prosecutor also stated that as the summons had only been served late on the previous Saturday evening he had not had an opportunity of considering the legal position. The chairman of the Court said that the best thing to do was to remand the prosecutor on bail.

The solicitor for the prosecutor contended that as the charge under which the prosecutor was arrested was withdrawn he was free to walk out of the Court. The chairman said that if he did he would be very quickly brought back. The prosecutor then attempted to leave the Court, but he was arrested and detained in Court. His solicitor then withdrew from the case and the Court proceeded to hear the summons and convicted the prosecutor of the offence charged against him and adjudged that he should pay £269 6*s.* 6*d.*, and in default be imprisoned in Belfast Gaol for six months without hard labour.

The prosecutor obtained a conditional order to quash the conviction on the grounds (*inter alia*):—(*a*) that the Justices disregarded the essentials of justice; (*b*) that as he had been detained and charged on the 26th August, a summons could not subsequently be issued against him in respect of the same offence.

Cause having been shown on behalf of the Justices of County Armagh against the conditional order, the present application was made on behalf of the prosecutor to make the order absolute notwithstanding cause shown.

Murphy, K.C., and *Johnson* for the prosecutor:—

We challenge the right of the Crown to proceed on one form of procedure (information), and subsequently to elect to proceed on another form of procedure (summons). The Crown proceeded on information, they afterwards changed their minds. It was not open to them to change their minds.

If a strict interpretation be given to the word "or" in section 224 of the Customs Consolidation Act, 1876, that section would seem to be in the most general terms. We submit that the word "or" must be read as "and."

The prosecutor was detained before the Crown ever thought of a summons.

The effect of section 186 of the Customs Consolidation Act, 1876, is that the prosecutor may either be detained or proceeded against by summons. Once the Crown had made their election they must proceed by information. The prosecutor had been detained, and from that time there was no jurisdiction to issue a summons.

The prosecutor's detention could not be justified under section 224 of the Customs Consolidation Act, 1876. That section does not give the justices a general power to issue summonses.

The prosecutor appeared in answer to the information and his appearance did not cure the informality.

[They also referred to sections 221, 232, 233, of the Customs Consolidation Act, 1876, and to section 12 of the Customs and Inland Revenue Act, 1879.]

Begley, *K.C.*, and *Dougherty* for the Justices for County Armagh :—

So far as the substance of the offence was concerned that was the same in both cases.

The effect of what happened before the Justices was that in effect an adjournment was offered.

In *Rex* (*McDonnell*) *v. Justices of Tyrone* (1), it was held that an order of the justices permitting a summons for an offence punishable on summary conviction to be withdrawn does not amount to an acquittal of the defendant, and a fresh summons may subsequently be issued for the same offence.

Withdrawal has no greater effect than a *nolle prosequi* would have.

If the withdrawal took place in Court, before the hearing of the summons, the Justices had cognisance.

Every offence under the Customs Acts is included under section 224. The case is very similar to that of an indictment which contains a count for larceny and one for receiving.

(1) [1912] 2 I.R. 44.

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Section 224 is sufficiently wide to enable a justice where a man is detained to issue a summons at any time.

This section covers all cases in which a person is liable to pay a fine or to be imprisoned.

As to the point that the summons was not served in time to give the prosecutor an opportunity of considering his legal position, we rely on *In re Williams* (1). There a summons was left at eight o'clock in the morning at the house of the defendant who was a collier, with his wife, requiring him to attend at a Petty Sessions to be held at eleven o'clock the next morning, at a place eight miles off, to answer a charge of assault. The defendant not returning home from the colliery till eleven o'clock at night did not receive the summons till that hour. Not being able in time to arrange for some one to supply his place at the colliery or to collect his witnesses to defend himself against the charge, he did not attend the Petty Sessions, and the justices convicted him of the assault in his absence.

It was held that the Justices were the judges of whether the summons was served in a reasonable time before the hearing, and that the fact (not known to them) that the defendant did not receive the summons until eleven o'clock at night, did not deprive them of their jurisdiction to hear and adjudicate upon the complaint. In that case Erle, J., said: "It is laid "down in decided cases that the Justices below are "the proper judges of what is a reasonable time."

In the present case we submit that the prosecutor should have asked for an adjournment or gone on with the case. In substance the Justices offered an adjournment. No adjournment was asked for on behalf of the prosecutor.

The summons could be served whether the prosecutor had been detained or not. The prosecutor was not detained when he was served with the summons.

The procedure was perfectly regular and was the proper procedure to adopt.

(1) 21 L.J. (Mag. Cas.) 46.

The Commissioners of Customs are not bound by a charge made by a policeman at the Border who could not be familiar with the niceties of the Customs law.

There is nothing in section 224 which prevents the issue of a summons for the offence charged.

The magistrates exercised their discretion which the Court should not set aside.

On a previous occasion when the prosecutor was remanded his solicitor was told that a summons would be issued.

The course taken by the Crown involved no injustice, and we submit that in all the circumstances the adjudication of the magistrates was correct.

Johnson (in reply):—

Rex (McDonnell) v. Justices of Co. Tyrone (1), is absolutely distinguishable from the present case. In that case there were not two proceedings before the Court at the same time. The sections that have been referred to all support the contention that the prosecutor must either be detained or proceeded against by summons.

" Or " cannot be read as " and " as argued on behalf of the Crown. One proceeding or the other must be taken, not both. The only cases in which there is power both to detain and to proceed by summons are cases dealing with tobacco and spirits.

MOORE, L.C.J., delivered the judgment of the Court as follows:— SIR WILLIAM MOORE, L.C.J.

This case has been very well argued. [His Lordship, having reviewed the facts, continued.]

A point has been made on behalf of Mackin that the summons was only served late on the previous Saturday evening and that there was no opportunity of considering the legal position.

The magistrates then offered to remand him, but as the prosecutor, instead of accepting this offer, attempted to leave the Court the magistrates were

(1) [1912] 2 I.R. 44.

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perfectly right in having him arrested and detained in Court. He was temporarily within their jurisdiction.

Two questions arise: (*a*) was there anything in the prosecutor's trial before the magistrates contrary to natural justice. The prosecutor had full notice of the charge he would have to meet and there is no evidence that the procedure adopted was in any way contrary to natural justice.

The other question: (*b*) is whether the prosecutor being under remand to appear on the original charge there was any power to proceed against him by summons.

Under section 186, the Crown could adopt either procedure. It was a matter for the election of the Crown who could exercise the election at any time before conviction.

Rex (*McDonnell*) *v. Justices of Tyrone* (1), was a case where it was held that an order of justices permitting a summons for an offence punishable on summary conviction to be withdrawn does not amount to an acquittal of the defendant, and a fresh summons may subsequently be issued for the same offence.

We do not think, however, that that case has much to say to the present case.

In *Rex v. Lockett, Grizzard, Gutwirth and Silverman* (2), the Court of Criminal Appeal in England (consisting of Sir Rufus Isaacs, C.J., Bray and Lush, J.J.) held that there is no rule of law that separate and distinct felonies cannot be tried together in one indictment. As a matter of practice and procedure the Judge presiding at the trial can in the exercise of his discretion quash the indictment or call upon the prosecution to elect upon which of the counts for felony they will proceed, in order to safeguard the interests of the prisoner and to prevent him from being embarrassed by being put upon his trial upon an indictment in which there are several counts for distinct felonies. In exercising his discretion as to putting the prosecution to their election, the material element to which the judge should direct his attention is whether the

(1) [1912] 2 I.R. 44. (2) [1914] 2 K.B. 720.

overt acts relied on as proving the different offences charged are in substance the same.

We do not think that in the present case the Crown had their hands bound.

There is nothing in the Customs Consolidation Act, 1876, to prevent a summons being issued while a person is under remand.

We think the conditional order should be discharged.

Solicitors for the prosecutor: *Fisher & Fisher.*

Solicitors for the Justices of County Armagh: *Martin H. Turnbull & Co.*

J. McC.

K.B.D. 1934.

Jan. 29, 30.

REX (McBIRNEY AND HENRY) v. THE JUSTICES OF COUNTY ARMAGH (1).

Customs—Evasion of Duty—Absence of evidence of importation—False statements made by persons charged—Strong suspicion—Necessity of evidence—Customs (Consolidation) Act, 1876, (39 & 40 *Vict., c.* 36), *sections* 186, 225, 259.

The defendants in a Customs prosecution were charged with being knowingly concerned in an attempted evasion of duty by knowingly harbouring three heifers imported from the Irish Free State into Northern Ireland.

Statements were made by these defendants to the police, which were afterwards admitted to be false.

No evidence of importation from the Irish Free State into Northern Ireland was given.

At the conclusion of the case for the prosecution it was submitted on behalf of the defendants that as there was no evidence that the heifers had been imported from the Irish Free State there should be a direction in the defendants' favour.

On behalf of the Crown it was contended that it was not necessary to give evidence that there had been importation from the Irish Free State, and that the Justices had evidence to justify them in holding that there was a dispute, and if they held that in fact there was a dispute, then the onus lay upon the defendants to prove that the cattle were not imported from the Irish Free State.

The justices convicted the defendants but stated a case for the opinion of the King's Bench Division.

Held, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that as there was no evidence that any offence had been committed or that the cattle were dutiable the justices were wrong in convicting.

CASE STATED for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division, by the justices sitting at Loughgall Petty Sessions as follows :—

This is a case stated by us, the justices sitting at Loughgall Petty Sessions pursuant to the Summary Jurisdiction Act, 1857, 20 and 21 Victoria, c. 43, on the application in writing of the said James McBirney

(1) In the King's Bench Division before Moore, L.C.J., and Brown, J.

and Ernest Henry, who are dissatisfied with our determination (hereinafter set forth) as being erroneous in point of law, for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland.

At the Loughgall Petty Sessions held on the 25th day of October, 1933, the complainant who is one of His Majesty's Officers of Customs and Excise charged the defendants that, on the 25th day of August, 1933, at Tullyvallen, County Armagh, they were knowingly concerned in an attempted evasion of a duty of Customs by knowingly harbouring three heifers imported from the Irish Free State into Northern Ireland with intent to defraud His Majesty the King of the duties thereon contrary to section 186 of the Customs Consolidation Act, 1876, whereby and by force of said section 186 of the said Act each of them had for such offence incurred a penalty of £100 0*s.* 0*d.* for which the Commissioners of Customs and Excise had elected to sue.

Evidence was given on behalf of the complainant :—

(*a*) That on the said 25th day of August, 1933, the defendant James McBirney made two statements to the police not in the presence of Ernest Henry. Those statements were put into evidence and before they were read, Mr. J. Patterson Best, solicitor for the Commissioners of Customs, directed our attention to the fact that these statements were evidence against James McBirney, but that they were not evidence against Ernest Henry. James McBirney states *inter alia* that three heifers and two foals of his were on the lands of Mrs. Henry and that the foals were on Henry's grass about three months. "The heifers were put "on Henry's lands the same time as the foals. "I brought them all over myself. I pay ten "shillings per month for grazing the horses "and about eight shillings a month for the "cattle. Ernest Henry is the one that I "handed the horses and cattle over to and he "informed me that the charge would be ten "shillings for the horses and eight shillings

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"a month for the heifers." James McBirney made a second statement on the same day in which he states about the three cattle: "I "brought them from Arthur Hughes's grass "about a week ago, they were on Hughes's "grass about three months before I brought "them to Henry's grass. I paid four pounds "for the grass."

(*b*) That on the 25th day of August, 1933, there were (*inter alia*) three heifers and two foals on the lands of Mrs. Henry.

(*c*) That on the said 25th day of August, 1933, when the defendant, Ernest Henry, was asked by the police as to what cattle he had on his lands, he signed two statements, in one of which he states (*inter alia*): "I live with my mother "on her farm in Tullyvallen. We have four "milk cows, three one and a half year olds "(one bullock and two heifers) and four sucking "calves. All the cattle have been reared by us. "All the horses and cattle here belong to our-"selves. We have no cattle on grass anywhere "else and we have no animals on our grass "belonging to anyone else." He then made a second statement in which he says *inter alia*: "the two colts on this land belong to James "McBirney, of Mulladuff. He put them on our "land about a week ago. He brought them "here from Terry Hughes's, of Sheetrim, where "he had grass taken. I was with him when he "took them from Hughes's and helped him "to take them to my mother's grass. He only "put them on my mother's grass until there "would come rain. There was no arrangement "as regards payment. The statement which I "gave to Sergant Taylor to-day was all lies." Those two statements were put into evidence and before they were read the said J. Patterson Besy directed our attention to the fact that they were evidence against Ernest Henry but were not evidence against James McBirney. Mrs. Mary Jane Henry, mother of said Ernest

Henry, was called as a witness for the prosecution; she had already signed a statement in presence of Sergeant H. Taylor on the 25th day of August, 1933, and this statement was not made in the presence of either of the defendants. She proved a hostile witness and we gave Mr. Best, solicitor for the complainant, permission to cross-examine her, and she then in open Court upon her oath admitted that the original statement was correct.

(*d*) That the police seized three heifers and two foals which were on the lands of Ernest Henry but subsequently returned the two foals to James McBirney.

No direct evidence was submitted that the said three heifers in respect of which the defendants were charged had been imported from the Irish Free State into Northern Ireland but there was a strong suspicion that the cattle had been so imported and there was clearly a dispute about the importation of the cattle from the Irish Free State.

At the conclusion of the complainant's case, counsel for the defendants submitted that as there was no evidence that the said three heifers had been imported from the Irish Free State, he was entitled to a direction.

Mr. Best, the solicitor for the complainant, submitted that it was not necessary for the complainant to give direct evidence that the said three heifers had been imported from the Irish Free State, and that the justices had ample evidence to justify them in holding that there was a dispute, and if they held that in fact there was a dispute that the onus lay upon the defendants to prove that the cattle were not imported from the Irish Free State, and if so imported that the Customs Duty payable had been paid.

We were all of the opinion that Mr. Johnson, counsel for the defendants had closed his case and that he did not intend to call any evidence as he appeared to us to be relying solely upon the law points raised by him. Our Chairman, Mr. Cope, then announced that we had decided to convict both defendants of the offence with which they were charged.

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Counsel for the defendants protested that we had convicted his clients without giving them an opportunity of giving any evidence. The said J. Patterson Best immediately replied that there was obviously some misunderstanding and quoted section 243 of the Customs Consolidation Act, 1876, the last paragraph of which is: "And any Justice shall and may amend "any Information conviction or Warrant of commit- "ment for any offence under such Acts at any time "whether before or after conviction" and asked us not to record the conviction but call upon counsel to call his witnesses. That Order was not recorded and we unanimously set it aside and called upon Counsel to produce his witnesses. Counsel then declined to call any witnesses as he said we had given our decision and we unanimously convicted both defendants. We gave counsel every opportunity to call his witnesses but he declined to do so, we found, as a fact, that there was a dispute and we also found as a fact that neither of the defendants had discharged the onus cast upon them of proving their innocence as required and we decided that we were bound by the decision in *The Attorney General v. Siddon* (1).

The opinion of the Court is sought as to whether we were right in law in convicting the defendants or either of them of the said charge.

E. S. Murphy, K.C., and *W. Johnson* for McBirney and Henry:—

We submit that there was no evidence to warrant the decision arrived at by the Justices.

In *the Attorney General v. Siddon* (1), which the Justices decided bound them, Vaughan, B., said in his judgment: "I agree, that, in order to fix a party with "the penalties of the statute, it is necessary that the "jury should be satisfied, by reasonable evidence either "that the party accused himself did the illegal act "charged with respect to the permit, or that he caused "it to be done by the instrumentality of the servant, "who may have authority for that purpose, either "express or implied, actual or constructive."

(1) 1 C. & J. 220, 230.

We submit that it cannot possibly be the law that the assertion of an officer of Customs is sufficient to place the onus on the person in possession of the goods.

There can be no dispute until some evidence has been given that the goods were imported from the Irish Free State.

In section 186 the word "knowingly" is used. As to that word, Brett, J., said in *Reg. v. Prince* (1), "the word 'knowingly' is used, where the noxious "character of the prohibited acts depends upon a "knowledge in the prisoner of their noxious effect, "other than the mere knowledge that he is doing the "acts. The presence of the word calls for more "evidence on the part of the prosecution."

Begley, K.C., and *J. G. Dougherty* for the respondents:

In *Betts v. Stevens* (2), Lord Alverstone, C.J., said: "The Justices have to find the facts themselves."

In *Dyer v. Park* (3), the Court held that the Justices having found the facts the Court could not hold that they were wrong.

In the present case the justices have found as a fact that there was a dispute, that is a fact, and cannot be dealt with in this Court.

We submit that it is quite clear that there was an allegation on the part of an officer of Customs that these cattle had been imported from the Irish Free State. There clearly was a dispute as to the place from which the cattle came.

Section 225 of the Customs Consolidation Act, 1876, provides for the case where the onus of proof is shifted on to the person charged. Section 225 is to be read along with section 259.

If a person charged fails to discharge the onus put on him, then it is open to the justices to find him guilty of the offence with which he is charged.

In *the Attorney General v. Siddon* (4), Alexander, L.C.B., said in his judgment: "If he (the defendant) "does not prove his innocence the law presumes his

(1) L.R. 2 C.C.R. 154, 161.
(2) 26 T.L.R. 5, 7.
(3) 38 J.P. 294.
(4) 1 C. & J. 220, 225.

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"guilt from the fact of the goods being found con-
"cealed upon his premises."

We rely on the words: "or concerning the place "from whence such goods were brought," in section 259 of the Customs Consolidation Act, 1876. The Customs Code is very drastic and the law presumes the guilt of the person charged in every case where the onus is cast on the defendant and he has not proved his innocence.

An officer of Customs on reasonable suspicion is entitled to show that duty on customable articles has not been paid.

There was evidence that in the belief of the officers of Customs these cattle came from the Irish Free State.

The justices were entitled to convict.

SIR WILLIAM MOORE, L.C.J.

MOORE, L.C.J., delivered the judgment of the Court as follows:—

This is a very important point that has been argued before us, and I may say with my colleague's concurrence, argued very well. It is very important. We undoubtedly know that there is a great deal of smuggling going on along the Border, and it ought to be stopped. There may be great difficulties in stopping it, but the officer ought to be supported, as long as he has kept within the law, and we quite recognise that it is the policy of the Statute to stop smuggling, and we have given that consideration ample scope.

We may consider the policy of the Statute, but we also have to consider that we are the sole guardians in the King's Bench Division of the rights and liberties of the subject. If the law has been strained, intentionally or unintentionally, against the rights of the subject, it is our duty to protect him, because we start with this, rightly or wrongly, on the case stated these two men have been convicted on what the magistrates say was strong "suspicion," without one particle of evidence, and the Crown allege that a man can be deprived of his liberty and convicted on strong suspicion under the Customs Acts. We are slow to admit that. The Crown have not satisfied us that an extreme proposition like that, which is the net issue we have to decide here, is the law of the land.

The Customs Officer has a right to interrogate the parties whom he suspects of having smuggled articles on his land as to how he got them and from where. That is quite right, and in the present case I do not think I am going too far; it has been admitted on both sides that the two people charged here gave false statements, and if a false statement like that is given, the question is, is there enough evidence, without more, to convict the persons charged who made these false statements?

Our view is that under the law of this land, there must be some evidence, not merely strong suspicion, before a man is convicted under this very penal code.

In this case there was no legal evidence that the cattle in question had ever been smuggled, and in this case it is as though one defendant swore that the things were red, which was untrue, and the other defendant swore that the things were blue, which was untrue. Incidentally, B. contradicted A., but A. swore the thing was red, and B. swore that it was blue, and the justices without any more found themselves drawing the inference, that it was green. We say they were not entitled to do that.

Until there was some smuggling proved, I do not think it was open to the justices to convict these two men merely because their own story in each case was untrue. There must be a step further. I think it is very like the cases we have at the Commission Court where my brother Judge and I tell the jury it would not be safe to convict a man on mere suspicion. That is almost a platitude with us apart from the special issue as to the knowledge of the traverser in the case of receiving, there must be some evidence that some crime has been committed.

If a man is found in the possession of stolen goods, the onus undoubtedly lies on him, but he is not called upon to clear himself until it has been proved that there has been a theft and some goods stolen. If no theft has been proved he cannot be convicted of being in possession of stolen goods. It is all part of the case.

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My colleague, Mr. Justice Brown, referred to section 225 of the Customs Consolidation Act, 1876. The defendant is served with a summons. There is proof given that he has been so served, but he does not appear, or he absconds. To my mind that case is exactly on the same footing, as the case where he fails to give evidence or where the evidence is not accepted by the Court. But in that case, where he offers no explanation, the case is before the Court and if the Crown are going to proceed, they can proceed in his absence on proof, but this still requires proof.

The words of the section are: "If on the day and at "the place appointed in such summons the party so "summoned shall appear before such justice, then "such justice shall proceed to hear and determine "the matter of such information, and on proof thereof, "either upon the confession of the party or upon the "oath of one or more credible witness or witnesses, "shall convict the party charged in such information, "but if the party summoned shall fail so to appear, "then if it be proved upon oath or affirmation to the "justice then present that such summons was duly "served at a reasonable time before the day appointed "for his appearance, such justice may proceed *ex parte* "to hear such information and adjudicate thereon "as if such party had personally appeared before "him in obedience to such summons."

To summarize—there must be some evidence. In the present case there is not a particle that any smuggling offence had been committed in some way connected with the charge before the Court, or that these cattle were dutiable. They do not become dutiable until it has been proved that they have been smuggled.

In the Case, as stated, no direct evidence was given that there had been any smuggling, or that these were smuggled cattle, and notwithstanding that, the justices, for the sole reason that the two defendants had told different lying cases, proceeded to convict them of smuggling and of having smuggled cattle in their possession. Belief at the best is not evidence. This is certainly contrary to our ideas of ordinary law and

unless the Customs Acts give special power to proceed in the absence of *prima facie* evidence that would make the defendants liable, which was not forthcoming, I do not think the justices had any right to convict without some such proof.

I have no doubt that the justices acted quite *bona fide*, but they had no power to convict on the ground of suspicion without something more.

Our answer to the question put to us in the Case Stated is, that the justices were wrong in convicting.

Solicitors for the complainants James McBirney and Ernest Henry: *Fisher & Fisher.*

Solicitors for the respondents: *Martin H. Turnbull & Co.*

J. McC.

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REX (McCONVILLE) v. JUSTICES OF ARMAGH (1).

May 3.

Customs—Evasion of Duty—Whether order made by justices convicting prosecutors, fining them, and in default of payment, imposing sentences of imprisonment for period of six months with hard labour is good—Effect of Criminal Justice Administration Act, 1914*—Customs and Inland Revenue Act,* 1879 (42 *&* 43 *Vict., c.* 21), *section* 12*—Criminal Justice Administration Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 58), *section* 16.

The prosecutors were charged on two summonses with being concerned in attempted evasions of customs duties and were brought before the justices.

The first summons charged them with being knowingly concerned in an attempted evasion of a duty of customs by dealing with twenty-six live fowl imported from the Irish Free State into Northern Ireland, contrary to section 4 (2) of the Irish Free State (Consequential Provisions) Act, 1922, and for contravention of Regulations 12 (1) of the Customs Land Boundary Regulations, 1933.

The summons stated that the prosecutors had rendered themselves liable in addition to any other penalty which they had incurred to a fine not exceeding £100 and the fowl were liable to forfeiture and for which the Commissioners of Customs elected to sue.

The second summons charged the prosecutors with being knowingly concerned in an attempted evasion of a duty of customs by dealing with twenty-six live fowl imported from the Irish Free State into Northern Ireland, contrary to section 186 of the Customs Consolidation Act, 1876. It was stated in the summons that by force of section 186 each of the prosecutors had for such offence incurred a penalty of £100 for which the Commissioners of Customs elected to sue.

The justices convicted each of the prosecutors on the first summons and fined each of them 2*s.* 6*d.*, and in default of payment they adjudged that each defendant should be imprisoned without hard labour until payment, and that the fowl should be forfeited.

They also convicted the defendants on the second summons, and each was fined £100 and in default of payment each was ordered to be imprisoned with hard labour for six months.

The prosecutors having applied to quash the convictions on certiorari on the ground that they were made without and in excess of jurisdiction, and were bad on the face thereof and were contrary to law.

(1) In the King's Bench Division before Moore, L.C.J., and Brown, J.

Held, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that section 12 of the Customs and Inland Revenue Act, 1879 (which provides that any person convicted of an offence against the Customs Acts, and who had been adjudged to pay a penalty of £100 or upwards may for a first offence be imprisoned for not less than six months nor more than nine months, and for a subsequent offence may in lieu of payment of the penalty be imprisoned with or without hard labour, for not less than six months nor more than twelve months) had been repealed by section 16 of the Criminal Justice Administration Act, 1914, and that the orders of the justices were made without jurisdiction and should be quashed.

CERTIORARI.

The prosecutors, Patrick McConville and James Joseph McConville, were summoned to appear on two summonses, at the Court House, Newry, on 17th January, 1934, before the Justices of County Armagh.

The summonses were issued on behalf of the Commissioners of Customs and Excise and were directed to the defendants jointly.

The first summons gave notice that an information was on January 5th, 1934, laid and exhibited against the defendants before James Boland, a Justice of the Peace for the County of Down, by William Nesbitt, an Officer of Customs and Excise. It was alleged in the information that the prosecutors (the defendants, in the summonses), at Loughross, in County Armagh, on the 29th November, 1933, were knowingly concerned in an attempted evasion of a duty of customs by dealing with twenty-six live fowl imported from the Irish Free State into Northern Ireland with intent to defraud, contrary to section 4 (2) of the Irish Free State (Consequential Provisions) Act, 1922, and for contravention of Regulations 12 (1) of the Customs Land Boundary Regulations, 1933.

The summons stated that the prosecutors rendered themselves liable in addition to any other penalty which they had incurred to a fine not exceeding £100, and the fowl were liable to forfeiture and for which the Commissioners of Customs elected to sue.

The second summons gave notice of a similar information on the same date laid before the same Justice by William Nesbitt.

This information alleged that the prosecutors at Loughross, in County Armagh, on the same day, were

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knowingly concerned in an attempted evasion of a duty of customs by dealing with twenty-six live fowl imported from the Irish Free State into Northern Ireland, with intent to avoid payment of the duties thereon, contrary to section 186 of the Customs Consolidation Act, 1876. The summons also stated that by force of section 186 the prosecutors each for such offence incurred a penalty of £100 for which the Commissioners of Customs elected to sue.

These two summonses came on for hearing on January 17th, 1934, at the Court House, Newry, before the Justices sitting at Petty Sessions, when each of the present prosecutors was convicted on the first summons, under section 4 (2) of the Irish Free State (Consequential Provisions) Act, 1922, and for contravention of Regulations 12 (1) of the Customs Land Boundary Regulations, 1933, and each was fined 2*s.* 6*d.* and in default of payment, each defendant was ordered to be imprisoned without hard labour until the sum be paid, and the fowl were ordered to be forfeited.

At the same time each prosecutor was convicted on the second summons, under section 186 of the Customs Consolidation Act, 1876, and each was fined £100, and in default of payment, each was ordered to be imprisoned with hard labour for a period of six months.

The two prosecutors were taken into custody and detained in prison.

The prosecutors (the defendants in the summonses) obtained a conditional order for a writ of certiorari to bring up and quash the convictions on the ground that the orders were made without and in excess of jurisdiction and were bad on the face thereof and were contrary to law.

Cause having been shown on behalf of the complainant in the summonses, an application was made to make the conditional order absolute notwithstanding cause shown.

Sheil for the prosecutors :—

The point to be decided is whether an order which inflicts, in default of payment, imprisonment with hard labour is good or not.

In *Rex (Meehan) v. Chairman and Justices of County Tyrone* (1), the conviction of a defendant of a Customs offence was challenged on the ground that imprisonment with hard labour was ordered in default of payment of the sums ordered to be paid.

It was admitted on behalf of the Crown that the order unless it could be amended was bad. The King's Bench Division held that the order could not be sent back to the justices to be amended after certiorari proceedings had been taken.

It is true that section 12 of the Customs and Inland Revenue Act, 1879, provides that "when any verdict "shall pass or conviction be had against any person "for any offence against the Custom Acts, and he shall "have been adjudged to pay a penalty of £100 or "upwards, the presiding justice may, if for a first "offence, commit the offender to one of Her Majesty's "prisons for not less than six months nor more than "nine months, and if for a subsequent offence may "order that the offender shall, in lieu of payment of the "penalty, be imprisoned, with or without hard labour, "for a period not less than six nor more than twelve "months." Section 16, however, of the Criminal Justice Administration Act, 1914, provides that "where "imprisonment is imposed by any Court in respect of "the non-payment of any sum adjudged by that or "any other Court to be paid, the imprisonment shall "be without hard labour. This section was made applicable to Ireland by section 43 of the same Act.

I submit that the effect of section 12 of the Customs and Inland Revenue Act, 1879, has been put an end to by section 16 of the Criminal Justice Administration Act, 1914.

The present case comes exactly within this last section.

The Attorney General (*A. B. Babington, K.C.*) (with him *Begley, K.C.*, and *J. G. Dougherty*) for the Justices of Armagh.

Rex (Meehan) v. Chairman and Justices of County Tyrone (1), has no application to the present case.

(1) [1934] N.I. 120.

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We submit that section 12 of the Customs and Inland Revenue Act, 1879, has not been repealed by section 16 of the Criminal Justice Administration Act, 1914.

Unless the Crown is expressly named, the section does not apply. The Customs code is a thing apart and the rights of the Crown could not be affected unless specially mentioned.

These rights are not expressly taken away and are therefore still in existence. Customs offences would have to be specially referred to in the section.

The rule of law applicable is expressed in Beal's Cardinal Rules of Legal Interpretation (Third Edition) at page 334 as follows :—" Where a statute is general, " and thereby, any prerogative, right, title or interest " is divested or taken from the King, in such case the " King shall not be bound, unless the statute is made " by express terms to extend to him."

In *Gorton Local Board v. Prison Commissioners* (1), Day, J., said in his judgment : " In the absence of " express words the Crown is not to be bound nor is " the Crown to be affected except by necessary " implication."

SIR WILLIAM MOORE, L.C.J.

MOORE, L.C.J., delivered the judgment of the Court as follows :—

We think that section 12 of the Customs and Inland Revenue Act, 1879, has been repealed by necessary implication. We are of opinion that the provision contained in section 16 of the Criminal Justice Administration Act, 1914, is intended to apply to all His Majesty's Courts, Superior or Inferior.

The conditional order of certiorari must be made absolute.

Solicitors for the prosecutors : *Collins & Collins.*

Solicitors for the respondents : *Martin H. Turnbull & Co.*

(1) [1904] 2 K.B. 165.

J. McC.

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CUSTOMS—Evasion of Duty—Election as to Penalty—When to be made—Amendment of Conviction—"Defect"—"*At any time*"—*Excise Management Act*, 1827 (7 & 8 *Geo.* 4, *c.* 53) *section* 71—*Customs (Consolidation) Act*, 1876 (39 & 40 *Vict.*, *c.* 36) *sections* 186, 223, 243—*Criminal Justice Administration Act*, 1914 (4 & 5 *Geo.* 5, *c.* 58) *sections* 16 (1), 43—*English Quarter Sessions Act*, 1849 (12 & 13 *Vict.*, *c.* 45) *section* 7. A summons charged the defendant "that he . . . "was concerned in carrying, to evade "the payment of duty thereon certain "uncustomed eggs . . . contrary to "section 186 of the Customs (Consoli-"dation) Act, 1876, whereby the said "defendant has forfeited the penalty "of £100 for which the Commissioners "have elected to sue." The defendant was convicted and the justices ordered him "to pay the sum of £10 11*s.* 0*d.* "being three times the value including "the duty thereon of sixty dozen of "eggs which we adjudge the defendant "to be carrying to evade payment of "the duties thereon . . . and for costs "the sum of £1 14*s.* 6*d.* within one "month and if said sums be not paid "within one month, we adjudge "Patrick Meehan to be imprisoned in "Londonderry Gaol for fourteen days,

"with hard labour unless said sums "be sooner paid." On a motion to make absolute a conditional order of certiorari which brought up the order of the justices for the purpose of being quashed. *Held*, by the King's Bench Division (Best, L.J., and Megaw, J.): (1) That it was open to the Commissioners at any time prior to conviction to say for what penalty they intended to sue. (2) That the addition of the punishment of something not warranted in law was not a "defect" within section 223 of the Act of 1876, but made the order wholly bad. (3) That the order could not be sent back to the justices to be amended after certiorari proceedings had been taken. (4) That if it was not competent for the justices to amend the order the Court had no power, either to direct or request them to do so. *Rex (Meehan) v. Chairman and Justices of County Tyrone.* [K.B.D. 120

CUSTOMS—EVASION OF DUTY—WHETHER ORDER MADE BY JUSTICES CONVICTING PROSECUTORS, *fining them, and in default of payment imposing sentences of imprisonment for period of six months with hard labour is good—Effect of Criminal Justice Administration Act*, 1914—*Customs and Inland Revenue Act*, 1879 (42 & 43 *Vict.*, *c.* 21), *section* 12—*Criminal Justice Administration Act*, 1914 (4 & 5 *Geo.* 5, *c.* 58), *section* 16. The prosecutors were charged on two summonses with being concerned in attempted evasions of customs duties and were brought before the justices. The first summons charged them with being knowingly concerned in an attempted evasion of a duty of customs by dealing with twenty-six live fowl imported from the Irish Free State into Northern Ireland, contrary to section 4 (2) of the Irish Free State (Consequential Provisions) Act, 1922, and for contravention of Regulations 12 (1) of the Customs Land Boundary Regulations, 1933. The summons stated that the prosecutors had rendered themselves liable in addition to any other penalty which they had incurred to a fine not exceeding £100 and the fowl were liable to forfeiture and for which the Commissioners of Customs elected to sue. The second summons charged the prosecutors with being knowingly concerned in an attempted evasion of a duty of customs by dealing with twenty-six live fowl imported from the Irish Free State into Northern Ireland, contrary to section 186 of the Customs Consolidation Act, 1876. It was stated in the summons that by force of section 186 each of the prosecutors had for such offence incurred a penalty of £100 for which the Commissioners of Customs elected to sue. The justices convicted each of the prosecutors on the first summons and fined each of them 2*s.* 6*d.*, and in default of payment they adjudged that each defendant should be imprisoned without hard labour until payment, and that the fowl should be forfeited. They also convicted the defendants on the second summons, and each was fined £100 and in default of payment each was ordered to be imprisoned with hard labour for six months. The prosecutors having applied to quash the convictions on certiorari on the ground that they were made without and in excess of jurisdiction, and were bad on the face thereof and were contrary to law. *Held*, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that section 12 of the Customs and Inland Revenue Act, 1879 (which provides that any person convicted of an offence against the Customs Acts, and who had been adjudged to pay a penalty of £100 or upwards may for a first offence be imprisoned for not less than six months nor more than nine months, and for a subsequent offence may in lieu of payment of the penalty be imprisoned with or without hard labour, for not less than six months nor more than twelve months) had been repealed by section 16 of the Criminal Justice Administration Act, 1914, and that the orders of the justices were made without jurisdiction and should be quashed. *Rex (McConville) v. Justices of County Armagh.* K.B.D. 222

CUSTOMS—EVASION OF DUTY—ABSENCE OF EVIDENCE OF IMPORTATION—FALSE STATEMENTS MADE BY PERSONS CHARGED—STRONG SUSPICION—NECESSITY OF EVIDENCE—*Customs (Consolidation) Act*, 1876, (39 & 40 *Vict.*, *c.* 36), *sections* 186, 225, 259. The defendants in a Customs prosecution were charged with being knowingly concerned in an attempted evasion of duty by knowingly harbouring three heifers imported from the Irish Free State into Northern Ireland. Statements were made by these defendants to the police, which were

afterwards admitted to be false. No evidence of importation from the Irish Free State into Northern Ireland was given. At the conclusion of the case for the prosecution it was submitted on behalf of the defendants that as there was no evidence that the heifers had been imported from the Irish Free State there should be a direction in the defendants' favour. On behalf of the Crown it was contended that it was not necessary to give evidence that there had been importation from the Irish Free State, and that the Justices had evidence to justify them in holding that there was a dispute, and if they held that in fact there was a dispute, that the onus lay upon the defendants to prove that the cattle were not imported from the Irish Free State. The justices convicted the defendants but stated a case for the opinion of the King's Bench Division. *Held*, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that as there was no evidence that any offence had been committed or that the cattle were dutiable the justices were wrong in convicting. *Rex* (*McBirney & Henry*) *v. Justices of County Armagh.*

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DEPOSIT RECEIPT IN JOINT NAMES—ADVANCEMENT FRAUDLENT INTENTION—MONEY PAID UNDER MISTAKE OF LAW—ACQUIESCENCE. On 20th July, 1921, John McEvoy, who was in ill-health, lodged with the defendant Bank £10,000 upon deposit receipt payable either to himself or his son (the plaintiff) or the survivor. This was done for the purpose not of changing the ownership but to avoid death duties. John McEvoy died on 20th September, 1921, and by his will left *inter alia* the residue of his estate to be held in trust for the plaintiff until he attained the age of twenty-five years and thereafter to the plaintiff absolutely. Pending the plaintiff attaining the said age the testator authorised his sister-in-law, Alice Kinney, to carry on his businesses on such terms as his trustees should think fit. On the death of John McEvoy and after the grant of probate the money on the £10,000 deposit receipt was transferred by the Bank to a new deposit receipt in the names of the trustees, on the basis that it still formed part of the deceased's estate. The businesses were carried on by Alice Kinney till 1925, then for a short time by a manager, and then by the plaintiff himself, but always at a loss, and monies from the deposit receipt were transferred by the trustees (who beyond signing blank cheques took practically no interest in and exercised no control over the business) from time to time to the current account of the businesses to discharge the overdraft thereon. The plaintiff acted as an intermediary in these transactions. Some time after attaining 21 years the plaintiff at the request of the defendants, signed a memorandum ratifying the transfers made prior to that date, and one of which for the purchase of some real estate had been made during his minority. With the exception of this transfer amounting to £2,076, the whole £10,000 was absorbed in the businesses before the plaintiff attained twenty-five years of age. *Held*, by the Court of Appeal, affirming Megaw, J.: (1) That where the transaction is tainted with fraud the Court will not receive evidence of the intention so as to rebut a presumption of advancement, and that the defendants were not entitled to transfer the money standing in the joint deposit receipt for £10,000 at the death of the deceased, into the names of the trustees. *Held* also (Best, L.J., dissenting):—(2) That the monies on deposit receipt had been paid or applied by the defendants for the use of the plaintiff. (3) That the payment was made with a full knowledge by both parties of relevant facts and that, though made under a mistake of law by both parties, it could not be recovered by plaintiff. (4) That even if the plaintiff was under a mistake as to his rights, there was no evidence that he was influenced by such mistake. *McEvoy v. Belfast Banking Company, Limited.*

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GUARANTEE—"*In consideration of advances heretofore made or that may hereafter be made*"—*Construction—Consideration—No intention of making further advances—No threat of legal proceedings—Forbearance to sue.* The defendant's husband's account with plaintiff's branch Bank at L. was overdrawn and the plaintiffs had, as security for this overdraft, mortgages of two policies of insurance upon the life of the husband. One policy with which the case was concerned was subject to a yearly premium of £24 12*s.* 0*d.*, payable in two equal moieties. The plaintiffs subsequently required the husband to obtain security for the payment of the premiums, and on the 7th November, 1924, the defendant signed a document not under seal which provided that in consideration of advances heretofore made or that might hereafter be made from time to time by the plaintiffs to her husband, she undertook to pay the premiums. It was also provided that in the event of the Bank having to pay the premiums or any other sums necessary for keeping on foot the policy, the defendant should pay such sums on demand with interest at Irish Banks' current rate. It was admitted on behalf of the plaintiffs that their anxiety was to secure the overdraft and that they had no intention of making any further advance to the plaintiff's husband. The defendant was not at any time informed as to the state of her husband's account or that the plaintiffs would not make advances to her husband. On 2nd January, 1931, the defendant at the request of the plaintiffs signed a second guarantee which was simply a renewal, which the defendant was told would make no change in her obligations. The plaintiffs had not threatened to take proceedings against the defendant's husband when the first guarantee was signed, and they did not do so subsequently, and "there was no talk about an agreement not to sue." The first default of the defendant's husband was in respect of the premium payable in December, 1931. This was paid by the defendant on 13th January, 1932. Further default occurred in respect of the June and December, 1932, premiums, and ultimately, these together with a sum for overdue charges were paid by the plaintiffs who sought to recover them by civil bill. *Held*, by the Court of Appeal (Andrews, and Best, L.JJ.), that there was no sufficient consideration to support the guarantee because, (*a*) as regards past advances the agreement could not be construed as a forbearance to sue; and, (*b*) as regards future advances the agreement only amounted to an indication on the part of the plaintiffs that they might make further advances to the debtor, but there was no agreement binding them to do so, and as no advance had in fact been made, the undertaking of the defendant failed for want of consideration. *Provincial Bank of Ireland, Ltd. v. Donnell.*
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HUSBAND AND WIFE—MAINTENANCE ORDER—ENFORCEMENT BY COMMITTAL—*Jurisdiction of Justices—Married Women (Maintenance in Case of Desertion) Act*, 1886 (49 & 50 *Vict.*, *c.* 52), *s.* 1—*Bastardy Laws Amendment Act*, 1872 (35 & 36 *Vict.*, *c.* 65). By section 1 of the Married Women (Maintenance in Case of Desertion) Act, 1886, which applied to England, Wales and Ireland, an Order made thereunder was to be enforced against the husband "in the "same manner as the payment of "money is enforced under an order of "affiliation." When the statute was passed there was no affiliation procedure in Ireland. In England, however, such Order could be enforced by committal under the Bastardy Laws Amendment Act, 1872. *Held*, by the Court of Appeal (affirming the decision of the King's Bench Division, Moore, L.C.J., and Brown, J.) that Magistrates had power to enforce the payments under the Maintenance Order against the husband in the same manner as in England, *i.e.*, by Committal. *Bradley v. District Justice of Bray disapproved. Rex (Murphy) v. Chairman and Justices of County Tyrone.*
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LANDLORD AND TENANT—LEASE—*Portion of Lands sold in Land Purchase Commission—Portion acquired compulsorily by Urban Council—Whether residue of lands liable for residue of Rent—Apportionment of Rent—Northern Ireland Land Act*, 1925 (15 & 16 *Geo.* 5, *c.* 34). By a lease, dated 12th December, 1857, the plaintiffs demised to the defendants an area of 746a. 1r. 8p. at an annual rent of £567 1*s.* 6*d.* The said rent was adjusted to £565 15*s.* 6*d.* under the Local Government (Ireland) Act, 1898; later, 51a. 0r. 21p. were acquired compulsorily by the Bangor Urban Council and the rent reduced by £34 10*s.* 2*d.* A further 459a. 1r. 34p. in the hands of agricultural tenants were sold under the provisions of the Northern Ireland Land Act, 1925, and the rent payable to the defendants reduced by £260 1*s.* 2*d.* Finally, under the same Act, the defendants purchased from the plaintiffs 113a. 1r. 2p. of the lands comprised in the lease on which an annual rent of £34 was apportioned by the Court. In the result only 114a. 1r. 22p. of the original 746a. 1r. 8p. remained within the lease. The plaintiff contended that the residue of the rent, £237 4*s.* 2*d.*, was borne by and was payable out of the 114a. 1r. 22p. *Held*, by the Court of Appeal (affirming the decision of Moore, L.C.J.), that the defendants, as assignees of this 114a. 1r. 22p., were not bound by such apportionments and reductions; and, accordingly, that they were not liable for the residue of the original rent, but only for an apportioned part of it determined according to the ratio which the value of the premises now vested in them bears to the value of the remainder of the premises demised by the lease. *Ker and Others v. Marquis of Dufferin and Ava and Others.*
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LAND PURCHASE—LEASE FOR TERM—RESERVATION TO LESSORS OF TIMBER, *subject to right of Lessee to cut for fencing—Lessor's rights as to Timber immediately before vesting of lands in Land Purchase Commission—Lessor's rights after Vesting—Northern Ireland Land Act*, 1925 (15 & 16 *Geo.* 5, *c.* 34), *section* 8 (1)—*Northern Ireland Land Act*, 1929 (19 *George* 5, *c.* 14), *section* 4 (1). By a lease, dated the 14th November, 1922, certain lands forming portion of the K. estate in

County Antrim were demised to the tenant for a term of twelve years from 14th November, 1921. There was a reservation to the lessors of the timber on the demised premises, save such as the tenant might require for the fencing of the premises. These lands became vested in the Land Purchase Commission, Northern Ireland, under the provisions of the Northern Ireland Land Act, 1925. An application was made to the Judicial Commissioners for a determination under section 4 (1) of the Northern Ireland Land Act, 1929, that the vendors were immediately before and after the date of the vesting of the holding in the Land Purchase Commission, entitled to the timber on the lands subject to the right of the tenant, till the 14th November, 1933, to cut for the due and proper fencing of the holding, with liberty to the lessors to enter and cut, fell and take away the timber. It was held by the Judicial Commissioner that the holding as from the vesting in the Land Commission was subject to the vendor's right or power to the extent claimed by them in their application. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.), affirming the Judicial Commissioner that, under section 4 (1) of the Northern Ireland Land Act, 1929, the rights over the timber possessed by the lessors who had become the vendors were preserved as they existed immediately before the vesting; and that the tenant purchaser's interest in the timber was limited to the use of the same for fencing during the unexpired portion of the lease. *Estate of Valensin and Balzani—Tenant, James Duffin.*
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LOCAL GOVERNMENT—Pensionable office—Decision of Civil Service Committee—Whether reviewable *by Court—Sanction—Whether may be given retrospectively—Local Government (Ireland) Act*, 1919 (9 & 10 *Geo.* 5, *c.* 19) *s.* 8 (1)—*Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67) *s.* 68 (2). The plaintiff was employed by the defendants as caretaker of a public park. On 1st March, 1930, the plaintiff resigned and the defendants granted him a pension of £12 per annum under the Local Officers' Superannuation (Ireland) Act, 1869, from 1st April, 1930. On 17th June, 1932, an application by the plaintiff for a life pension of £41 6*s.* 10*d.* per annum was granted by the Civil Service Committee in pursuance of powers vested in them by section 8 of the Local Government (Ireland) Act, 1919, as amended by section 68 of the Government of Ireland Act, 1920, payable by the defendants from 1st April, 1930. *Held* (1) That the decision of the Civil Service Committee was reviewable by the Court. (2) That the plaintiff held a "pensionable office" within the meaning of section 8 sub-section 1 of the Local Government (Ireland) Act, 1919. (3) That the sanction required to be given by the said section 8 sub-section 1 could be given retrospectively. *Miller v. Coleraine Borough Council.*
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LOCAL REGISTRATION OF TITLE—Registered Owner—Land Certificate—Deposit by way of Equitable Mortgage—Subsequent charge—*Refusal of Depositee to produce Land Certificate—Note of Lien in Register—Practice under Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict.*, *c.* 66), *ss.* 29, 31, 36, 44, 45, 47, 49, 69, 70, 81—*Land Registry Order IV*, *rr.* 20, 21; *Order VIII*, *rr.* 1 & 2 (3)—*Land Transfer Acts*, 1875 and 1897—*Land Registration Act*, 1925. On 28th March, 1931, W., the registered owner of the lands comprised in Folios 172, 2372 and 1437, deposited the original land certificates relating thereto, with the appellant Bank as security for his current account. No writing accompanied the deposit. On 22nd October, 1932, W. executed in favour of F. a deed of charge on the lands contained in the said folios as the security for a loan. F. in due course, applied to have the charge registered in all the said folios. The appellants refused to produce the said land certificates unless their lien was secured by a note entered in the Register, evidencing their claim. This the Registrar refused to do on the ground that to do so was contrary to the practice of the Land Registry in Northern Ireland. On a subsequent application by F., the Registrar ordered that the

said land certificates be lodged in the office of the Land Registry within 14 days. The Bank appealed from these two orders. *Held*, by Megaw, J., that the priority of the appellants' charge created by the deposit of the land certificates would remain unimpaired by being lodged in the Land Registry. *Held* also, that on the request of the appellants a note of their charge should have been entered in the said folios by the Registrar. *In re Local Registration of Title (Ireland) Act*, 1891, *and of Robert James Watters.*
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PRACTICE—PROCEDURE—COSTS—NEGLIGENCE—JOINDER OF TWO DEFENDANTS—VERDICT AGAINST ONE DEFENDANT AND IN FAVOUR OF THE OTHER DEFENDANT—*Jurisdiction to order unsuccessful defendant to pay successful defendant's costs to plaintiff—"Special cause"—for costs not following event—Judicature Act (Ireland)*, 1877 (40 & 41 *Vict., c.* 57), *section* 53—*Rules of the Supreme Court (Ireland)*, 1905, *Order LXV., r.* 4—*Exercise of discretion.* The plaintiff was injured by a collision between two vehicles, a motor car belonging to the defendant M., and a motor hackney cab belonging to the defendant McC., and brought an action for damages against both defendants. He was a passenger in the defendant M's. car. The plaintiff claimed alternatively that the accident was due to the negligence of each defendant, or to the negligence of the defendants jointly. The defendant McC. denied negligence, and alleged contributory negligence on the part of M., whilst M. denied negligence and pleaded that any damage suffered by the plaintiff was caused solely by the negligence of the defendant McC. The defendant McC., had by letter maintained that M's. car was entirely responsible for the damage. The action was tried by the Lord Chief Justice and a special jury who found that the accident was caused by the negligence of the defendant M. alone, and damages were assessed at £200. The Lord Chief Justice gave judgment for the plaintiff against the defendant M. for that sum and costs, and he also gave judgment for the defendant McC. against the plaintiff with costs. He refused the plaintiff's application for an order declaring the plaintiff entitled to be indemnified by the defendant M. against the costs ordered to be paid by the plaintiff to the defendant McC. He, however, gave the plaintiff special liberty to appeal on the question of costs. On a motion brought by the plaintiff to vary the Lord Chief Justice's order:—*Held*, by the Court of Appeal (Andrews and Best, L.JJ.), that in such a case the Court had jurisdiction to order the plaintiff to pay the costs of the successful defendant, and then to add those costs to the costs which the unsuccessful defendant was ordered to pay to the plaintiff. *Held* also, that it was reasonable and proper to join both defendants in the action and that the Court had discretion to make the order which the plaintiff asked for. *Held* further, that such an order should only be made in a proper case by which is meant a case where the plaintiff has in the opinion of the Court or a Judge acted reasonably in joining the successful defendant as a party to the action. *Mulligan v. Mulligan.* C.A. 9

PRACTICE—REMITTAL TO INFERIOR COURT—*Action fit and proper to be prosecuted in superior Court—Conflict between medical affidavits as to injuries—Common Law Procedure (Ireland) Act*, 1870 (33 & 34 *Vict., c.* 109) *section* 6—*Appeal—Discretion of Court of first instance.* The plaintiff appealed from an order made by Moore, L.C.J., remitting an action for personal injuries and for damage to his horse and van sustained by having been

knocked down by the defendant's motor lorry. The plaintiff, in his affidavit, described his injuries and set out his estimated loss of weekly earnings. medical expenses and the damage to his horse, van and harness. The defendant, in his affidavit, denied that he was guilty of negligence, stated that the plaintiff himself did not appear to have received any injuries whatever, and that the damage to his property was trifling. Conflicting medical affidavits were sworn on behalf of the plaintiff and defendant. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.), that the action ought to be retained in the Superior Courts, as the plaintiff's affidavit and especially the medical affidavits sworn on his behalf, had disclosed injuries and loss for which a jury might reasonably award £50 damages or more. *Held* also, that the case was one in which the discretion of the Lord Chief Justice must be interfered with, and that the Court was entitled in a proper case to review the remitting of an action by a Court of first instance. *Garbett v. Cooper.*
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REVENUE—Estate Duty—Assets *consisting of shares in Company situate in Irish Free State—Testator and life tenant both domiciled in Northern Ireland—Situation of assets at death of tenant for life.* A testatrix, B.W., died domiciled in Northern Ireland. By her will she gave all her property to trustees to allow same to remain in the state of investment in which it might be at the time of her death or to change said investments as the trustees in their absolute discretion might think fit and to pay the income thereof to the testatrix's daughter, N.H., during her life, and after her death to hold the principal and income of the property in trust for the testatrix's granddaughter, B.N.W.H., absolutely. She appointed W.E.W. and her daughter, N.H., executors of her will. The assets included shares in a Company situate in the Irish Free State. N.H., the life tenant, died on 23rd April, 1928, within two months of the death of B.W., and before representation to the estate of B.W. had issued. A claim for estate duty arose on the death of N.H. in respect of the residuary estate of B.W. passing on the death of N.H. under the will, under section 1, of the Finance Act, 1894. It was contended on behalf of the Crown that the residuary estate of B.W. as at the death of N.H. constituted a Northern Ireland chose in action, as B.W. died domiciled in Northern Ireland and the forum of administration of her estate was the Northern Ireland Courts. The executor of the estate of B.W., however, contended that the estate of B.W. passed in specie on the death of N.H. *Held*, by Brown, J., that after the death of B.W., N.H. had a proprietary interest in her mother's estate and that estate duty was payable in the Irish Free State and not in Northern Ireland, the residuary estate having passed on the death of N.H., and having consisted of shares in a Company, situate in the Irish Free State. *Attorney-General v. Walker.*
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——17 & 18 Geo. 5, c. 16, ss. 1, 44 (N.I.) 158
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SUMMARY JURISDICTION—JUSTICES—INFORMATION *originally sworn subsequently Summons issued—Whether Crown entitled to withdraw Information and proceed on Summons—Customs Consolidation Act,* 1876 (39 *& 40 Vict., c.* 36), *sections* 186, 197, 221, 224, 232, 233.—*Arrest.* The prosecutor was arrested on 26th August, 1933, and charged with being unlawfully and knowingly concerned in the illegal importation of cattle, contrary to the Customs Consolidation Act, 1876. He was remanded on bail until the 11th September, 1933. An order was made on the 11th September, 1933, adjourning the trial until the 9th October. An information was sworn on the 4th October, 1933, by an officer of Customs and Excise in which it was charged that the prosecutor was knowingly concerned in an attempted evasion of customs duty on cattle imported from the Irish Free State into Northern Ireland with intent to defraud the Revenue. A summons, dated the 4th October, 1933, to attend on the 9th October, 1933, was issued against the prosecutor in pursuance of the information. The prosecutor attended at the Petty Sessions Court to answer the charge for which he had been arrested, when it was stated by the solicitor who appeared for His Majesty's Customs and Excise that he would withdraw the original charge and proceed on foot of the summons. It was contended on behalf of the prosecutor that as he had been detained and charged on the 26th August, a summons could not subsequently be issued against him, in respect of the same offence. A point was made on behalf of the prosecutor that as the summons had been served late, there had been no opportunity to consider the legal position. The chairman of the Court said that the best thing to do was to remand the

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prosecutor on bail. The solicitor for the prosecutor objected and maintained that as the charge under which he was arrested was withdrawn, he was free to walk out of the Court. The prosecutor then attempted to leave, but was arrested and detained in Court. The solicitor for the prosecutor then withdrew from the case and the Court heard the summons and convicted the prosecutor of the offence charged and adjudged that he should pay the sum of £269 6*s.* 6*d.* or in default be imprisoned for six months. *Held* by the King's Bench Division (Moore, L.C.J., and Brown, J.), that the procedure adopted was perfectly regular, and that the Court had power to elect, right up to the time of conviction, whether to proceed on information or on summons. *Rex* (*Mackin*) *v. The Justices of County Armagh.* K.B.D. 204

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WORKMEN'S COMPENSATION—Employer and Workmen—Compensation for Injury by Accident—*Man working in cylinder under river—Decompressing Chamber—"Caisson Disease"—Workmen's Compensation Act* (*Northern Ireland*), 1928 (17 & 18 *Geo.* 5, *c.* 16), *section* 1—*Whether workmen may proceed under section* 1, *in respect of injury resulting from an industrial disease—Workmen's Compensation Act* (*Northern Ireland*), 1927 (17 & 18 *Geo.* 5, *c.* 16), *section* 44. The applicant had been employed in the construction of the new bridge in the city of L. over the River Foyle. Part of the work was done in a cylinder, sunk in the river, in which compressed air with a pressure of two or three atmospheres was used to drive out the water. On coming out of the cylinders the workers, before coming into the outside air, passed into a decompressing chamber, where the atmospheric pressure was gradually lowered. If this were not done, they would sustain serious injury called "Caisson Disease." The applicant had been working at the Bridge for about six months. He worked not daily but frequently in the compressed air chamber, and he had been certified as medically fit for this work. On the 22nd June, 1932, he worked in the cylinder from 6 a.m. to 6 p.m. with intervals for meals. At 6 p.m. he went into the decompressing chamber for the usual time. When he went into the outer air he felt sick and dizzy, followed by heatings all over his body. He admitted that the decompressing operation on this 22nd June was in no way different (including the pressure of air) from that of other days. The applicant made a claim for injury for accident within the meaning of section 1 (1) of the Workmen's Compensation Act (Northern Ireland), 1927. The doctor who examined the applicant on 25th June, in his evidence before the Recorder of L., expressed the opinion that he was suffering from "Caisson Disease," caused by coming from a compressed air chamber too quickly into the ordinary air pressure, and the applicant's panel doctor confirmed this opinion. Two other doctors, however, who were examined for the respondents, expressed the opinion that applicant was not suffering from "Caisson Disease," and one of them refused applicant a certificate that he was so suffering. The Recorder found that the applicant was suffering from this disease brought on by passing too quickly to the ordinary atmospheric pressure: that this was an accident within the Workmen's Compensation Acts and that his condition was to be attributed to such accident. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.), affirming the Recorder of L., and dismissing the appeal, that the applicant was entitled to proceed under section 1 of the Workmen's Compensation Act, 1927, in respect of injury resulting from an industrial disease, the facts being such as to warrant the finding of accident within that section: *Held*, also, that the failure of the decompressing chamber to safeguard the applicant from "Caisson Disease" constituted an "accident," within the meaning of the Workmen's Compensation Acts. *Swan v. Dorman, Long & Co., Ltd.* C.A. 158

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